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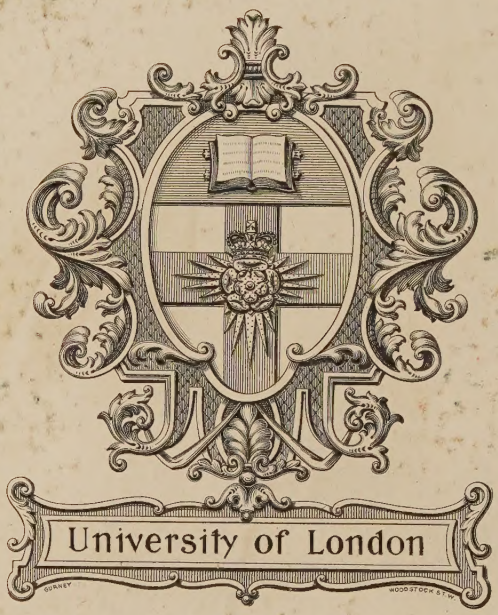

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CASES

DETERMINED BY THE

KING'S BENCH DIVISION

OF THE

HIGH COURT OF JUSTICE

AND BY THE

COURT OF APPEAL

ON APPEAL THEREFROM

AND BY THE

COURT FOR CROWN CASES RESERVED

AND BY THE

RAILWAY AND CANAL COMMISSION.

PERRING & CO. *v.* EMERSON.

1905
Oct. 31.

Landlord and Tenant—Distress—Uncertificated Bailiff—Seizure of Goods of Third Party—Conversion—Law of Distress Amendment Act, 1888 (51 & 52 *Vict. c.* 21), *s.* 7.

If a person, not holding a certificate issued under s. 7 of the Law of Distress Amendment Act, 1888, levy a distress for rent, and, in so doing, seizes goods upon the demised premises which are not the property of the tenant but of a third party, the owner of the goods is entitled to recover damages in respect of the seizure of his goods from the landlord who has authorized the distress.

Appeal of the defendant from the Brentford County Court.

The plaintiffs, who were furniture dealers, had supplied furniture on the terms of a hire-purchase agreement to one Pierce, the defendant's tenant in a flat. On February 22, 1905, the furniture then being at the flat and Pierce being in arrear with the payment of the hire instalments, the plaintiffs sent their foreman with three other men and a van to take possession

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of the furniture and to remove it from the flat, as they were entitled to do under the terms of the hire-purchase agreement. At this date Pierce was in arrear with the rent of the flat, not having paid the quarter's rent which had become due on December 25, 1904, and one Milner, who was a servant of the defendant, but who was not a certificated bailiff (1), becoming aware that the furniture was about to be removed by the plaintiffs' men, entered the flat and, stating that he had authority from the defendant to distrain for the arrears of rent, claimed to detain the furniture until the rent had been paid. The plaintiffs' men, however, proceeded with the removal and placed the furniture in their van which was standing in a private roadway belonging to the defendant, but not forming part of the premises demised to Pierce. The defendant's servants detained the van in the roadway until the arrival, later in the day, of a duly certificated bailiff, who, acting in the name of and with the authority of the defendant, had the furniture removed from the van and taken back to the flat, where it was detained until it was eventually sold by the defendant.

The plaintiffs then brought this action claiming damages for the conversion of their furniture. The county court judge gave judgment for the plaintiffs. The defendant appealed.

Morle, for the defendant. Having regard to the decision in *Capel* v. *Buszard* (2) it cannot be contended for the defendant that the seizure of the furniture in the van by the certificated bailiff was a good distress, the goods not being then on the demised premises. But there had been a good distress by Milner before the furniture was removed from the flat, and therefore the plaintiffs' right to remove their furniture was lost.

(1) Law of Distress Amendment Act, 1888 (51 & 52 Vict. c. 21), s. 7: "From and after the commencement of this Act no person shall act as a bailiff to levy any distress for rent unless he shall be authorized to act as a bailiff by a certificate in writing under the hand of a county court judge. . . . . If any person not holding a certificate under this section shall levy a distress contrary to the provisions of this Act, the person so levying, and any person who has authorized him so to levy, shall be deemed to have committed a trespass."

(2) (1829) 6 Bing. 150.

The fact that Milner was not a certificated bailiff does not render the distress illegal as regards the plaintiffs, for the protection afforded by s. 7 of the Law of Distress Amendment Act, 1888, only applies as between landlord and tenant and does not enure for the benefit of third parties whose goods are on the demised premises. In their case a distress which complies with the requirements of the common law, as this one did, is a good distress even though the person levying be not a certificated bailiff. Any irregularity or illegality in the course of a distress can be waived by the tenant, and if there is a waiver by the tenant the distress is good as against a third party whose goods have been seized: *Werth* v. *London and Westminster Loan and Discount Co.* (1) It is not suggested that in the present case there was in fact any waiver by the tenant, but if there had been, the plaintiffs could not have been heard to say that the distress was illegal as against them, and it follows from this that s. 7 can have no application to third parties. Further, the section does not say that a distress by an uncertificated bailiff shall be illegal or void for all purposes, but that the person levying and the person authorizing him to levy "shall be deemed to have committed a trespass," that is, a trespass on the premises, not on the goods, which shows that the section is only dealing with cases between a landlord and his tenant. The section derogates from the common law rights of a landlord, and therefore must be construed strictly.

Henlé, for the plaintiffs. The true meaning and effect of s. 7 is that any person purporting to act as a bailiff in levying a distress without holding a certificate, is not levying a distress at all, but is committing a trespass, and if in so doing he seizes the goods of third parties, he is liable to them for the trespass. Where a statute provides that an act previously legal shall not in future be done unless certain conditions precedent have been complied with, the non-compliance with those conditions renders the act illegal and void for all purposes: *Fergusson* v. *Norman*. (2) There is no ground for the suggestion that s. 7 only applies to cases between landlords and tenants. Sect. 6 shows that the Act contemplates cases in which goods of third persons are

(1) (1889) 5 Times L. R. 521. (2) (1838) 5 Bing. (N. C.) 76.

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seized. Even if a seizure by an uncertificated bailiff is a distress, though an illegal one, the illegality cannot be waived by the tenant so as to prejudice other persons whose goods are seized. [He referred to *Gibbs* v. *Cruickshank*. (1)] In *Werth* v. *London and Westminster Loan and Discount Co.* (2) the act complained of occurred before the Act of 1888 came into force, and the case did not in any way turn on the construction of s. 7. Further, the wrongful act was the levying of a distress between sunset and sunrise, which the Court treated as a mere irregularity which could be waived. That case is no authority for the defendant's contention.

[He was stopped.]

LORD ALVERSTONE C.J. This case in my opinion raises a question of very considerable difficulty and one which I should be glad to have considered by the Court of Appeal. There is much to be said in favour of the view that the Law of Distress Amendment Act, 1888, was passed with the object of amending the law of distress as between landlord and tenant, and that the provision that a distress was not to be levied by an uncertificated bailiff was inserted as a protection to the tenant. But in my opinion it is impossible to say that the operation of the Act is confined to cases between landlord and tenant. It is quite clear, for instance, that under s. 6 the rights of other persons are dealt with. Sect. 7 provides: [His Lordship read the section.] Now, that section undoubtedly may be said in the main to deal with the relationship of landlord and tenant, because it imposes a new liability on a landlord who authorizes an uncertificated bailiff to levy a distress even though the landlord may in fact not know that the bailiff does not hold a certificate; but I am unable to come to the conclusion that the Act intended that liability to attach only in cases where the question arises as between the landlord and his tenant. It cannot have been overlooked that a distress may be levied on goods which are not the property of the tenant but of some third person, and since the section causes a seizure by an uncertificated bailiff to be an illegal act, if it had been intended

(1) (1873) L. R. 8 C. P. 454. (2) 5 Times L. R. 521.

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to limit the operation of the section to cases between landlord and tenant, language would have been used pointing clearly to that result. In the present case it is not disputed that Milner was an uncertificated bailiff, and that the goods had been removed from the flat by the plaintiffs before the arrival on the scene of the certificated bailiff. Therefore, unless the defendant can rely on the original seizure by Milner, who was not a certificated bailiff, he cannot justify as against the plaintiffs the retaking possession of the goods. I have come to the conclusion, though not without hesitation, that the protection of s. 7 operates for the benefit of the owner of the goods seized as well as for that of the tenant, and I am therefore of opinion that the county court judge was right in giving judgment for the plaintiffs.

Counsel for the defendant relied on the case of *Werth* v. *London and Westminster Loan and Discount Co.* (1), but in that case this section was not under consideration. There, the landlord had distrained after sunset, but the tenant had waived the irregularity, and it was held that that being so a third party could not avail himself of the irregularity. The case is clearly no authority on the construction and effect of s. 7. For these reasons I am of opinion that this appeal must be dismissed.

WILLS, J. I am of the same opinion. A landlord has no right to appropriate to his own use the goods of a third person which are on the demised premises except by means of an effective seizure under a distress. The critical question in the case before us is as to the effect of s. 7 of the Law of Distress Amendment Act, 1888, and for my part I fail to see how an act which is forbidden by that section and which is therefore illegal can be relied on as conferring any rights at all upon the landlord. It seems to me that no effect can be given to a seizure by an uncertificated bailiff, that being an act absolutely forbidden. Therefore, in the circumstances of the present case, the seizure by the uncertificated bailiff had in no way affected the right of the plaintiffs to resume possession of their goods, and as they did remove them from the demised premises before the certificated bailiff appeared upon the scene, their subsequent seizure not on the demised premises on

(1) 5 Times L. R. 521.

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behalf of the landlord cannot be justified. The Law of Distress Amendment Act was passed only seventeen years ago, at which time the question of the propriety of allowing a landlord to seize the goods of third persons had come to the fore and had been much under consideration; and if it had been intended to preserve a landlord's common law right to the goods of third persons seized under a distress, notwithstanding that the seizure had been made in a manner which the statute prohibited, leaving to the owner a bare right of action against the unauthorized bailiff, probably a person not worth suing, I think that language adequate for the purpose would have been introduced into the section. We have been much pressed with the decision in *Werth* v. *London and Westminster Loan and Discount Co.* (1), but, as has been pointed out by counsel for the plaintiffs, that case did not turn on s. 7 of the Act of 1888, as the distress was levied before that Act was passed. The act complained of there was the levying of a distress after sunset, and the Court did undoubtedly treat that as a mere irregularity which the tenant could have and in fact had waived. I must confess, though I do not wish to speak positively on the point, that I should have thought a distress after sunset was not a mere irregularity, but was illegal, and that different considerations would have applied. But, however that may be, we are dealing here with an act which is expressly forbidden by the statute, and it seems to me impossible to treat that as otherwise than an illegal act.

Counsel for the defendant also relied on the concluding words of the section, "shall be deemed to have committed a trespass," contending that the use of the word "trespass" showed that the section was only dealing with the question arising between a landlord and his tenant. I do not agree with that argument. I think that the object of introducing those words was to prevent the application of the rule that a person doing an act forbidden by statute is guilty of a common law misdemeanour; for where the section which forbids the act also provides a penalty or a remedy, that doctrine does not apply. I do not think that these words were intended to have the limiting effect contended for by counsel. In my opinion they were introduced simply because

(1) 5 Times L. R. 521.

otherwise an uncertificated bailiff who levied a distress would have been liable to be prosecuted for committing a common law misdemeanour.

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For these reasons I think that the defendant had no right to seize the plaintiffs' goods, and that the appeal must be dismissed.

DARLING J. I am of the same opinion.

Appeal dismissed.

Solicitor for plaintiffs: *P. J. Rutland.*

Solicitor for defendant: *W. H. Lane.*

F. O. R.

[CROWN CASE RESERVED.]

THE KING *v.* PALIN.

1905

Nov. 9.

Criminal Law—Falsification of Accounts—Document not belonging to or in Possession of Employer—Falsification of Accounts Act, 1875 (38 & 39 *Vict. c.* 24), *s.* 1.

The prisoner, a servant, was convicted under s. 1 of the Falsification of Accounts Act, 1875, on an indictment which charged him with making a false entry in an account. It was proved that the account in question did not belong to and was not in the possession of his employer:—

Held, that the conviction must be quashed, since the intention of the Legislature, as manifested in the preamble to the Act, was to punish the falsification by clerks, officers, servants, or others of their employers' accounts.

CASE stated for the opinion of the Court for the Consideration of Crown Cases Reserved by the Chairman of Quarter Sessions for the County Palatine of Lancashire (sitting at Preston).

1. The defendant was indicted under the 38 & 39 Vict. c. 24 (Falsification of Accounts Act), s. 1 (the second part of the section).

2. The first count of the indictment was:—"That Benjamin Higginson Palin on the thirtieth day of July in the year of our Lord one thousand nine hundred and five, then being servant to Edmund Arthur Le Gendre Starkie, unlawfully, wilfully and with

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intent to defraud, did make and concur in making a certain false entry in a certain account, to wit an account of certain rabbits delivered by the said Benjamin Higginson Palin to certain tenants of the said Edmund Arthur Le Gendre Starkie his master, by falsely entering in such account twenty-two rabbits as having been delivered by the said Benjamin Higginson Palin to one John Coates, a tenant of the said Edmund Arthur Le Gendre Starkie. Whereas in truth and in fact the said twenty-two rabbits were not delivered to the said John Coates, as he the said Benjamin Higginson Palin well knew at the time when he made such false entry as aforesaid, and which said entry was in the words and figures following, 'List of rabbits, Coates 22,' against the form of the statute," &c.

3. There were four other counts alleging severally four other false entries as to rabbits. Three of them were similar to the first count. In the remaining one the account was alleged to belong to the defendant's employer. The evidence was that the account in question in this and all the other counts did not belong to the said employer. Therefore the said allegation became immaterial, and the point hereinafter set out arose on each of the five counts.

4. The defendant was tried on October 19, 1905.

5. At the close of the case for the prosecution, counsel for the defendant objected that as there was no evidence that the account belonged to, or was in the possession of, the defendant's employer, or was received by him for or on behalf of his employer, the prosecution had failed to prove an offence under the said statute.

6. He referred to the preamble of the said statute as defining its scope and purpose; and further contended that the word "such" governed not only "book," but also the subsequent words, "document or account."

8. The Court overruled the objection subject to the statement of a case. The jury found the prisoner guilty. He was sentenced to six months' imprisonment with hard labour. The execution of the judgment was respited until the decision of this case. The defendant failing to find a surety, was committed to and is in prison.

9. The question for the Court is whether the defendant was rightly convicted on the indictment. (1)

No counsel appeared for the defendant.

George Elliott, for the prosecution. The conviction was right. The words of the latter half of the section are sufficiently wide to include any false entry in a document, if made with intent to defraud, whether that document belong to the employer or not. The section makes a difference between a false entry in a book and a false entry in a document or account, and the intention of the Legislature was to meet the case where the actual book belonging to the employer was not used, but the employer was nevertheless defrauded by a false entry in a document shown to him. In Archbold's Criminal Pleading, 23rd ed., p. 592, it is pointed out that the document or account in which the false entry was made need not belong to or be in the possession of the employer. The language of the section is merely a repetition of the language of s. 83 of the Larceny Act, 1861 (24 & 25 Vict. c. 96), which deals with the destruction, alteration, mutilation or falsification of the books, &c., belonging to a body corporate or public company, and goes on to make it an offence to "make or concur in the making of any false entry, or omit or concur in omitting any material particular, in any book of account or other document."

LORD ALVERSTONE C.J. We all think that this conviction cannot stand. I express no opinion as to the wording of s. 83

(1) By the Falsification of Accounts Act, 1875 (38 & 39 Vict. c. 24): "Whereas it is expedient to amend the law so as to punish the falsification by clerks, officers, servants, and others of their employers' accounts, books, writings, or documents: Be it enacted . . . .

"(1.) That if any clerk, officer, or servant, or any person employed or acting in the capacity of a clerk, officer, or servant, shall wilfully and with intent to defraud destroy, alter, mutilate, or falsify any book, paper, writing, valuable security, or account which belongs to or is in the possession of his employer, or has been received by him for or on behalf of his employer, or shall wilfully and with intent to defraud make or concur in making any false entry in, or omit or alter, or concur in omitting or altering, any material particular from or in any such book, or any document, or account, then in every such case the person so offending shall be guilty of a misdemeanour."

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of the Larceny Act, or whether that section requires that the documents therein mentioned should be the property of the company or not.

We have to deal with the Falsification of Accounts Act, 1875, and it seems to me that the preamble is not unimportant: "Whereas it is expedient to amend the law so as to punish the falsification by clerks, officers, servants, and others of their employers' accounts, books, writings, or documents." In this case the prisoner appears to have made a false entry in his own account, and that does not seem to me to fall within the statute. It is quite plain that under the first part of the section the book, paper, writing, valuable security or account—the word "document" does not occur there—must be in the possession or constructive possession of the employer; but it is contended that the last part of the section as to making false entries is wider in its scope, and that as it refers to any such book "or any document or account," it is not essential that the document or account should belong to the employer. That construction would reduce the section to an absurdity, and would make the first part of the section unnecessary. To say that it is an offence to destroy, alter, mutilate or falsify any document belonging to the employer, and also that it is an offence to make a false entry in any document or account, whether belonging to the employer or not, is to make the second and subordinate part of the section far wider than the first part, and to go beyond the purview of the Act as declared in the preamble.

The conviction must therefore be quashed.

WILLS J. I agree, and will only add that in my opinion the earlier part of the section deals with the same area of books and documents as the later. It seems to me absurd to suppose that for the earlier part of the section it is necessary to prove that the book, paper or writing was the property of the employer, while in a charge under the last half of the section it is not so unless the false entry was made in a book. "Paper, writing" in the first portion of the section is exactly synonymous with "document" in the second portion, and there is no reason why "paper, writing" should be put on the same footing with "book"

in the one case, and "document" not be so treated in the other. It seems to me that the word "any" in the latter half of the section has been left in per incuriam before "document," and that we ought to disregard it.

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DARLING, WALTON, and JELF JJ. concurred.

Conviction quashed.

Solicitors for prosecution: *W. J. & E. H. Tremellen, for Baldwin, Weeks & Baldwin, Clitheroe.*

A. P. P. K.

BROOKS *v.* BAKER AND OTHERS.

1905
Nov. 7.

Parliament—Registration—County Vote—Service Franchise—Occupation of Servant excluding Occupation of Master—Representation of the People Act, 1832 (2 *&* 3 *Will.* 4, *c.* 45), *s.* 24—*Representation of the People Act*, 1884 (48 *&* 49 *Vict. c.* 3), *s.* 3.

Sect. 3 of the Representation of the People Act, 1884 (which provides that where a man inhabits any dwelling-house by virtue of any office, service or employment, he shall be deemed for the purposes of the Representation of the People Acts to be an inhabitant occupier of such dwelling-house as a tenant), does not operate to exclude the legal occupation of the man's employer so as to give that employer, being the freeholder, a freehold vote for the county in respect of the dwelling-house.

CASE stated by a revising barrister.

At a court held before me, a barrister duly appointed to revise the list of voters for the Northern or Tewkesbury division of the county of Gloucester, the respondents duly claimed to have their names entered in the parliamentary ownership list for the parish of Cheltenham.

The following is the entry in the claim of the respondent William Baker:—

Name of the Claimant at full length, the Surname being first.	Place of Abode.	Nature of Qualification.	Description of Qualifying Property.
Baker, William...	Weimar, Bath Road, Cheltenham.	Freehold House	Weimar Cottage, Cheltenham.

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The following were the admitted facts in the case of the respondent William Baker :—

The claimant is owner of Weimar House and grounds, and of Weimar Cottage referred to in the fourth column of the claim. Weimar House and grounds are occupied by the claimant, and he is on the occupation list of the register for the parliamentary borough of Cheltenham in respect of such occupation, with the description "dwelling-house" of his qualification. Weimar Cottage stands within the grounds of Weimar House, but apart from it. It is occupied by the claimant's gardener, Joseph Woore, who by reason of his service is entitled to occupy it. Woore is on the occupiers' list, division 2 (service), of the said register in respect of such occupation, and it is admitted that he is properly so registered. It was contended that the occupation of Woore was the occupation of the claimant, and that by reason of s. 24 of the Representation of the People Act, 1832, the claimant being so on the parliamentary register for the borough of Cheltenham was not entitled to qualify as an ownership voter for the Northern or Tewkesbury division of the county of Gloucester in respect of the said cottage. (1)

I was of opinion that Woore was an inhabitant occupier as tenant within the meaning of s. 3 of the Representation of the People Act, 1884, and therefore that the claimant was not the occupier of the cottage, and that he had a good qualification in respect of it as a freeholder, the value not being in question, and I allowed his claim. (2)

(1) By the Representation of the People Act, 1832 (2 & 3 Will. 4, c. 45), s. 24: "Notwithstanding anything hereinbefore contained no person shall be entitled to vote in the election of a knight or knights of the shire to serve in any future parliament in respect of his estate or interest as a freeholder in any house . . . . occupied by himself . . . . such house . . . . being . . . . of such value as would, according to the provisions hereinafter contained, confer on him the right of voting for any city or borough . . . ."

(2) By the Representation of the People Act, 1884 (48 & 49 Vict. c. 3), s. 3: "Where a man himself inhabits any dwelling-house by virtue of any office, service, or employment, and the dwelling-house is not inhabited by any person under whom such man serves in such office, service, or employment, he shall be deemed for the purposes of this Act and of the Representation of the People Acts to be an inhabitant occupier of such dwelling-house as a tenant."

The other claimants whose names and qualifications are set out in the schedule hereunder written were objected to upon the same grounds. It was admitted that in each of these cases the qualifying property described in the fourth column of the claim was a cottage or tenement in the occupation of the claimant's servant, which he was entitled to occupy by reason of his service; that the servant in each case was properly registered on division 2 in respect of such occupation; that the claimants were owners of the said cottages or tenements as well as of the principal residence in the grounds of which they were situate, and that the claimants were registered in respect of the occupation of their residences in the same manner as the respondent Baker. Upon these admissions, and for the same reasons, I allowed the claims.

Due notice of appeal from my decisions was given.

If the Court be of opinion that my decisions were wrong, the register is to be amended by erasing the names of the respondents from the list of parliamentary ownership voters for the said parish of Cheltenham.

R. Mortimer Montgomery, for the appellant. The revising barrister was wrong. The gardener was only deemed to be an inhabitant occupier of the cottage for the purpose of the Representation of the People Acts, and so got the service qualification to vote (Representation of the People Act, 1884, s. 3). He was not an occupier for all purposes, and his occupation did not therefore exclude the occupation of his master so as to give the master a freehold vote for the county in respect of the cottage. The section was not intended to enlarge the freehold vote. The heading to the section is "Extension of Household and Lodger Franchise," which shews that that was all that the Legislature intended to affect. In *Dobson* v. *Jones* (1) Tindal C.J. says: "The gardener who is put into a house in the garden, or the porter who occupies the lodge at a park gate, cannot be considered to occupy as tenants, but as servants merely whose possession and occupation is strictly and properly that of their masters."

(1) (1844) 5 M. & Gr. 112, at p. 120.

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Before the Act of 1884 the gardener, therefore, would have no vote, and the whole object of s. 3 of that Act was to give him a vote in respect of his occupation, and he was therefore, for the purpose of the Representation of the People Acts, to be deemed to be an inhabitant occupier. As Lord Coleridge C.J. says in *M'Clean* v. *Prichard* (1): "Before the Representation of the People Act, 1884, the class to which he belongs possessed neither the parliamentary nor the municipal franchise, and by that Act Parliament gave them the former and the former only."

W. H. Clay, for the respondents. The section makes the gardener in this case an inhabitant occupier as a tenant of this cottage. His occupation is therefore no longer the occupation of his master, and his master gains a vote for the county in respect of the cottage. In *M'Clean* v. *Prichard* (2) it was the municipal franchise only that was in question, and that case is not an authority on the present question. The gardener is for all purposes of the Representation of the People Acts to be deemed the inhabitant occupier of the cottage, and as there cannot be two inhabitant occupiers of this cottage, for the master and servant cannot be joint occupiers, it is not occupied by the master, who therefore has a right to his freehold vote.

Montgomery was not called upon to reply.

LORD ALVERSTONE C.J. I am of opinion that this appeal must be allowed, and that the register must be amended by expunging the names of these persons from the parliamentary ownership list. We must look at the object of the Representation of the People Act, 1884. Sect. 3, with which we have to deal, comes under the heading "Extension of Household and Lodger Franchise," and that section does not purport to deal at all with freehold votes. I think s. 3 was simply framed for the purpose of enabling a man who inhabits a dwelling-house by virtue of his service or employment to get his vote

(1) (1887) 20 Q. B. D. 285, at p. 287.

(2) 20 Q. B. D 285.

as if he were occupying the house as a tenant. The gardener Woore, therefore, is to be deemed to be an inhabitant occupier of Weimar Cottage for the purpose of the Representation of the People Acts, and gets his vote accordingly; but the question we have to decide is whether his occupation of the cottage puts his employer out of occupation, so as to enable the employer to claim a freehold vote for the county in respect of the same cottage. In my opinion there is nothing in the Act to lead to such a conclusion. The gardener is not made the inhabitant occupier; he is only to be deemed the inhabitant occupier for the purpose of the Representation of the People Acts. The section seems to me to have been passed with the sole intention of giving a vote to the man who occupies a house by virtue of his service, and we should, I think, be going much too far if we were to say that the occupation of the servant excludes the occupation of the master in such a way as to give the master a freehold vote. I do not desire to express any opinion as to the vote of the occupier of such a house where it is also occupied by a person who by virtue of his service has an occupation vote under this section.

WILLS J. I agree.

DARLING J. I am of the same opinion. The Court is sometimes obliged by the Legislature to put an interpretation on a word which it does not ordinarily bear when it has been enacted that something "shall be deemed" to be something else. Here I do not think there is that difficulty. Sect. 3 says that a person who inhabits a dwelling-house by virtue of any office, service or employment is to be "deemed" an inhabitant occupier of that dwelling-house for the purpose of the Representation of the People Acts. It does not say that he becomes the only occupier of any kind, and I think the section means what it says, and gives such a man a vote as an inhabitant occupier without excluding the occupation of the house by the employer. If the Legislature had intended to do this and to give the employer a freehold vote in respect of the

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dwelling-house, I think much stronger and more definite language would have been employed.

Appeal allowed.

Solicitors for appellant: *Russell Cooke & Co.*

Solicitors for respondents: *Ayrton, Biscoe & Barclay.*

A. P. P. K.

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Nov. 8.

FOWLER *v.* CRIPPS.

Merchandise Marks Act, 1887 (50 & 51 *Vict. c.* 28), *ss.* 2, 3—*False Trade Description.*

Where the generic name of certain commodities has by the usage of the trade come to be confined to a particular species, the fact that the application of that name to another species is literally correct will not prevent it from being a false trade description within the meaning of s. 3, sub-s. 1, of the Merchandise Marks Act, 1887.

Washing soda and Glauber's salt are both salts of soda in a crystalline form; but the description "soda crystals" is by the usage of the trade of manufacturing chemists applied only to the former. The appellant sold Glauber's salt under the name of "soda crystals":—

Held (by Lord Alverstone C.J. and Wills J., Darling J. dissenting), that he had applied to the goods a false trade description.

CASE stated by justices for the Borough of Tunbridge Wells.

The appellant was charged on an information with having unlawfully sold a quantity of Glauber's salt mixed with soda crystals, together of the weight of one hundredweight or thereabouts, to which a false trade description (to wit) the words "soda crystals" was applied, contrary to the provisions of s. 2, sub-s. 2 of the Merchandise Marks Act, 1887 (50 & 51 Vict. c. 28). At the hearing the following facts were proved:—

The appellant is a retail oilman and hardware dealer carrying on business at Tunbridge Wells, and on September 1, 1904, he sold in the ordinary way of his trade to William Butler, a traveller in the employ of Brunner, Mond & Co., Ltd., manufacturing chemists, one hundredweight of soda which was described on the invoices delivered with the goods as "soda crystals." The price charged for the goods was 4*s.*

A portion of the soda so purchased by the said W. Butler was analysed and found to contain soda crystals or crystallized

carbonate of soda mixed with Glauber's salt or crystallized sulphate of soda. Analyses of six several samples were proved with the following results:—

	Soda Crystals.	Glauber's Salt.
(1)	64 per cent.	34 per cent.
(2)	78·89 ,, ,,	18·78 ,, ,,
(3)	35·1 ,, ,,	64·53 ,, ,,
(4)	37·29 ,, ,,	61·87 ,, ,,
(5)	56·5 ,, ,,	43·1 ,, ,,
(6)	39·3 ,, ,,	60·7 ,, ,,

In explanation of the difference in the results of these analyses of the samples it was stated that the carbonate of soda and the sulphate of soda having been separately produced were mechanically mixed together subsequently to their manufacture, and consequently in any sample there might be more of one sort than of the other.

There are many salts of sodium which are prepared in a crystallized form. Seventeen salts of sodium are mentioned in the British Pharmacopœia; and one witness said there were as many as three thousand salts of sodium. Carbonate of soda and sulphate of soda are two of them. These are both usually prepared and sold in a crystallized form.

The process of crystallization is similar in each case. The result is a chemical combination in a crystallized form of about 33 per cent. of carbonate of soda, or sulphate of soda, as the case may be, and 66 per cent. of water.

Carbonate of soda is produced by various processes, and one of such processes, being that employed by Messrs. Brunner, Mond & Co., is known as the ammonia process. The crystallized carbonate of soda prepared by this process contains a small proportion of sulphate of soda. This small quantity is left in the manufacture or is added to the soda ash in the process of crystallization for the purpose of hardening the crystals. There are other processes by which crystallized carbonate of soda is produced different from the process adopted by Brunner, Mond & Co. These processes, two of which, known as the Leblanc and the Perrikoff processes, were referred to by the witnesses, have

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a proportion of sulphate of soda. In the Leblanc process there is a trace, and in the Perrikoff process about 30 per cent., but not in the form of crystal.

Carbonate of soda in the crystallized form and not containing more than 2 per cent. of sulphate of soda is the commodity known as washing soda for domestic use, and is usually described as "soda crystals." This description is not applied to sulphate of soda, nor usually to carbonate of soda containing more than 2 per cent. of sulphate of soda. All the witnesses who gave this evidence were (with one exception) analytical manufacturing chemists.

The market value of crystallized carbonate of soda is about double that of Glauber's salt or crystallized sulphate of soda.

Sulphate of soda or Glauber's salt has no detergent qualities, but in appearance is exactly like carbonate of soda.

The appellant was not called as a witness, and no evidence was tendered on his behalf.

It was contended on behalf of the appellant that crystallized soda and soda crystals are the same; that when a description is true with regard to the material of which two or more things are composed it cannot under any circumstances become a false trade description as to any one of them; that soda is a generic term applicable to any preparation or compound of sodium, and cannot be a false description when applied to any one of them; that the words "soda crystals" when applied to crystallized carbonate of soda or to crystallized sulphate of soda is a true description of the material of which each article is composed, and, therefore, cannot be a false trade description when applied to a mixture of both; that there was no evidence of any false trade description within the meaning of the Merchandise Marks Act, 1887.

It was contended on behalf of the respondent that the words "soda crystals" were only applicable to crystallized carbonate of soda containing not more than 2 per cent. of sulphate of soda, and that it was therefore a false trade description when applied to a mixture of crystallized carbonate of soda and crystallized sulphate of soda when the proportion of the latter was more than 2 per cent. of the whole.

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The justices held that "soda crystals" meant ordinary washing soda, and that on the evidence before them that article consisted of crystallized carbonate of soda containing not more than 2 per cent. of sulphate of soda or Glauber's salt, and that it was a false trade description when applied to the mixture sold by the appellant; and they accordingly convicted the appellant subject to the above case for the opinion of the Court.

Avory, K.C., and *Bonsey*, for the appellant. The sale of this mixture under the name of soda crystals was not an application of a false trade description within the meaning of the Merchandise Marks Act. (1) By s. 3 a false trade description is defined to mean "a trade description which is false in a material respect as regards the goods to which it is applied," and the particular respect in which the description is alleged to be false here is that mentioned in par. (*d*) as to the material of which the goods are composed. But the case shows that it was not false in that respect, for Glauber's salt is a species of soda crystals, and to call it by that name is a true description. The custom of the trade cannot make that false which apart from the custom is perfectly true.

Sir Edward Carson, S.-G., H. Sutton, and *Safford*, for the respondent. The contention of the appellant loses sight of the distinction between a "false description" and a "false trade description." The use of a particular name may be perfectly true as a description, and yet false as a trade description. For s. 3, sub-s. 1, expressly provides that "the use of any . . . . word . . . . which according to the custom of the trade is commonly taken to be an indication of" (inter alia) the material of which any goods are composed "shall be deemed to be a trade

(1) By the Merchandise Marks Act, 1887, s. 3, sub-s. 1: "For the purposes of this Act . . . . the expression 'trade description' means any description, statement, or other indication, direct or indirect . . . .

"(*d*) as to the material of which any goods are composed . . . .

"And the use of any figure, word, or mark which, according to the custom of the trade, is commonly taken to be an indication of any of the above matters, shall be deemed to be a trade description within the meaning of this Act;

"The expression 'false trade description' means a trade description which is false in a material respect as regards the goods to which it is applied."

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description within the meaning of this Act." And here it is found as a fact that according to the custom of the trade "soda crystals" means ordinary washing soda, or, in other words, crystallized carbonate of soda containing not more than 2 per cent. of the sulphate.

Avory, K.C., in reply.

DARLING, J. In this case I have the misfortune to differ from the opinions of my Lord and Wills J., but I feel bound to express my view. The summons charged that the appellant sold a quantity of Glauber's salt mixed with soda crystals under the false trade description of "soda crystals." The ground of the complaint was that, whereas, according to the custom of the trade, the term "soda crystals" means washing soda or carbonate of soda containing not more than 2 per cent. of Glauber's salt, the mixture sold by the appellant contained a very much higher proportion of Glauber's salt, varying from 18 per cent. in one of the samples taken to as much as 64 per cent. in another. It is said that this was a false trade description as to the material of which the mixture was composed. Now, there are many salts of soda in a crystalline form, and sulphate of soda, or Glauber's salt, is one of them. It is, in fact, one of the many "soda crystals." And to describe it as what in fact it is cannot, in my opinion, amount to a false trade description; for I think that no amount of usage in the trade can give one species of the class the exclusive right to a description which, though true of that species, is not untrue in fact of the others. Then if it is equally true to describe carbonate of soda and sulphate of soda separately as soda crystals, it cannot be a false trade description to apply that name to a mixture of the two. I think the appeal should be allowed.

WILLS, J. In my opinion this conviction ought to stand. The Merchandise Marks Act is an Act passed not to ensure scientific accuracy in trade terms, but to protect trade, and to ensure as far as legislation can do so that trade shall be carried on honestly, and that terms shall not be applied to substances where the application would, according to the common acceptation of those terms in the trade, lead the purchaser to assume

that he was buying something different from what he really was buying. Sect. 3, sub-s. 1, says that "the use of any . . . . word . . . . which according to the custom of the trade is commonly taken to be an indication of any of the above matters," including par. (*d*), as to the material of which any goods are composed, "shall be deemed to be a trade description." Here we have the term "soda crystals" used, which is commonly understood in the trade to mean washing soda. That is a trade description. In the trade it is commonly understood to be a guarantee that the substance is carbonate of soda, containing not more than 2 per cent. of the sulphate. And if, as here, the substance contains 18 per cent. or more of the sulphate, the application to it of the term "soda crystals" is to my mind clearly a false trade description. The fact that a description as applied to particular goods is scientifically correct will not prevent it from being a false trade description. And the converse is equally true. Many trade terms are of very old standing, and it may be that with the advance of science some of them will become scientifically incorrect, but proof of that incorrectness will not cause them to be false trade descriptions if they continue to be understood in the trade as indicating the same substances which they did when those terms first came into use.

LORD ALVERSTONE C.J. I agree with the view taken by Wills J. If I could come to the conclusion that all that is required to satisfy the statute is to shew that the description is chemically true, I think it would be impossible to support this conviction. But I agree with Wills J. in thinking that that was not the way in which the section was intended to be construed. The clause in s. 3, sub-s. 1, that "the use of any figure, word, or mark which, according to the custom of the trade, is commonly taken to be an indication of any of the above matters, shall be deemed to be a trade description within the meaning of this Act," in my opinion renders it impossible so to construe the section.

Appeal dismissed.

Solicitors for the appellant: *Neve & Beck.*

Solicitor for the respondent: *Solicitor to the Board of Trade.*

J. F. C.

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Nov. 8.

THE KING *v.* LLOYD.

County Court—Deputy Judge—Appointment of Two Deputies to act for different Courts during same Period—Validity of Appointment—County Courts Act, 1888 (51 & 52 *Vict. c.* 43), *s.* 18.

A county court judge may lawfully appoint a deputy to act for a particular Court within the county court district; it is not necessary that he should appoint him to act for the whole district. Nor is there any objection to the judge appointing two deputies to act for the same period, provided they are to act for different Courts.

Rules for a certiorari to bring up a judgment of the deputy judge of the Brompton County Court and for prohibition.

In January, 1905, an action was brought in the Brompton County Court by Henry Solman against Frank Day to recover damages for personal injuries, occasioned by the negligent driving of the defendant's carriage. The return day for the trial of the action was fixed for February 9. On February 9 the defendant and his witnesses attended the Court, but owing to want of time the trial was adjourned by Mr. Clement Lloyd, who was sitting as deputy judge, till March 9. On March 9, at the instance of the defendant, who was plaintiff in an action that day part heard and proceeding in the Chancery Division of the High Court, the trial was again adjourned till March 24. On March 24 the case was in the list for hearing, but was not reached owing to want of time. Being pressed by the defendant's counsel to adjourn the case to a day when it was sure to be tried, the deputy judge adjourned it to March 30, on which day he sat and disposed of the case. Verdict and judgment was given for the plaintiff for a sum of 63*l.* 19*s.* At the dates in question the judge of the county courts of Brompton and Marylebone was Judge Stonor. Mr. Clement Lloyd sat as deputy judge on those dates by virtue of an appointment in writing, dated February 13, 1905, under the hand of the judge, in the following terms: "Brompton County Court. I, Henry James Stonor, judge of the said Court, with the permission of the Lord High Chancellor, do hereby appoint Clement Elphinstone Lloyd, Esq., barrister-at-law, to act as my deputy for the said

Brompton County Court in my absence, from the thirteenth day of February until the thirteenth day of April next, and failing the said Clement Elphinstone Lloyd from illness or other cause on any day or days during the said period, I further appoint F. B. Fitzroy Cowper, Esq., barrister-at-law, to act as my deputy in my absence for the said Court on such day or days aforesaid." By a document in similar terms and of even date, Judge Stonor appointed the said F. B. Fitzroy Cowper to act as his deputy for the Marylebone County Court from February 13 to April 13, and failing him from illness or other cause on any of the said days, he appointed the said Clement E. Lloyd to act as his deputy for the said Court. March 30 was one of the ordinary Court days of the Marylebone Court, and was not one of the ordinary Court days of the Brompton Court, and Mr. Fitzroy Cowper was sitting, by virtue of the above appointment, at the Marylebone Court on that day, trying cases at the same time that Mr. Clement Lloyd was trying the action of *Solman* v. *Day* at the Brompton Court. Rules having been obtained for a certiorari to quash the proceedings in the action, on the ground that the judge had no power to appoint two deputies to sit in different Courts at the same time, and that the hearing was consequently coram non judice, and for a prohibition:

Sir Edward Carson, S.-G., and *H. Sutton*, for the deputy county court judge, shewed cause. The appointment of the two deputies to act during the same period of two months was not ultra vires, for they were to act for different Courts. A county court judge when appointing a deputy under s. 18 of the County Courts Act, 1888, is not bound to appoint him to act for the whole county court district; he may appoint him to act for one or more Courts within the district. This is shewn by the language of s. 21, which provides that in the event of the death of the judge the appointment shall not be vacated, but the deputy "shall continue to act in all the Courts to which he was appointed." Those words "to which he was appointed" recognize that the deputy may be appointed to some of the Courts to the exclusion of others. The section is taken from s. 11 of 19 & 20 Vict. c. 108, in which the words were "shall continue to act in all the Courts of the

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district of which the deceased was judge." The change of language was advisedly introduced to meet the very point now raised by the defendant. Then if the judge may appoint one deputy for one portion of his district he may lawfully appoint another deputy to act concurrently for another portion of his district. It was contended when the rule was moved that the hearing in the present case was a breach of Order I., r. 2, which provides that "two Courts shall not be held before the same judge on one day," for what the judge is prohibited from doing himself he is equally prohibited from doing by deputy; but that rule has no application to this case, for it expressly provides that it "shall not apply to the holding of an adjourned Court," and this was an adjourned Court, for March 30 was not one of the ordinary Court days at the Brompton Court.

Duke, K.C., and *Hodges*, in support of the rules. A county court judge has no power to appoint two deputies in his district at the same time, for he has no power to appoint a deputy to act for any area less than that of the whole district. By s. 3 the country is divided into "county court districts"; and by s. 5, "there shall be a judge for each district." The office of the judge is one single office, that of county court judge for the whole district, which may, and generally does, include several county courts or places at which he sits. He does not hold several offices as judge of his several courts. This is shown by s. 10, which provides that "the judge of each district shall attend and hold the Court at each place where Her Majesty shall have ordered that the Court shall be held within the district." Then, having but one office, the judge can appoint but one deputy for any one period; he cannot split his office up into sections and simultaneously appoint a different deputy for each. Sect. 18, under which the appointment of a deputy is made, clearly does not contemplate the appointment of more than one deputy. It says, "in the case of the illness or unavoidable absence of any judge it shall be lawful for such judge to appoint a barrister-at-law"—in the singular—"to act as his deputy," and concludes with this passage: "Every deputy appointed under this section during the time for which he shall be so appointed shall have all the powers and privileges and perform all the duties of the

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judge for whom he shall have been so appointed." But by s. 9 the judge while within the district of any one of his Courts has jurisdiction to make an order ex parte "in any action or proceeding pending in any of the Courts of which he is judge." Then if the deputy is to have power to make orders ex parte in actions pending in any of the Courts of which the person who appointed him is judge, it must be because he is appointed as deputy for the whole district. Again, s. 20 points in the same direction: "No deputy judge . . . . shall, during the time he acts or is entitled to act as such deputy, practise as a barrister in any Court within the district for which he acts or is entitled to act as such deputy." That word "district" must there mean one of two things, either the whole county court district, or the district of a particular Court. There is no tertium quid, for the word is used in the Act in those two senses only. But it cannot be used in this section in the sense of the district of a particular Court, for the words "in any Court within the district" imply that the district there referred to may contain more Courts than one. Therefore it must be used in the larger sense, and implies that the deputy is entitled to act for the whole county court district and for nothing less. With regard to s. 21 the words "shall continue to act for all the Courts to which he was appointed," mean nothing less than "continue to act for all the Courts of the district," for the section goes on to provide that while so acting the deputy "shall receive as remuneration for the period that he may act as deputy after the death . . . . of the judge a rateable proportion of the salary and travelling allowances attached to the office so vacant." If then two deputies may be appointed, the Treasury would on the death of the judge have to pay to each deputy during the remainder of his period of acting the same amount that the county court judge would be entitled to receive during a similar period if he were alive. But that cannot have been intended. In *Parker* v. *Kett* (1), Lord Holt, speaking of the deputy steward of a manor, said that he "being deputy of the steward, is thereby invested with all the power, and may do all such acts as his principal could do; for the nature of deputation is to convey all the power of the principal without any reservation

(1) (1701) 12 Mod. 467.

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or restriction; for as he cannot enlarge his deputy's power by giving him a greater one than he has himself, so he cannot abridge it by reserving part to himself."

LORD ALVERSTONE C.J. In this case the county court judge of the Brompton and Marylebone County Courts, purporting to act under s. 18 of the County Courts Act, 1888, appointed upon the same day, with the approval of the Lord Chancellor, two gentlemen to act as his deputies during the same period of two months, the one at the Brompton County Court and the other at the Marylebone County Court, and we are invited upon the rule to say that those appointments were ultra vires, and that the judge had no power to make, nor the Lord Chancellor to approve, the appointment of more than one deputy for the same judge at the same time. It seems to me that we ought not to come to that conclusion unless we are absolutely compelled to do so, because I cannot imagine a case in which it would be less right to give effect to a technical point than one in which, as here, a defendant has appeared before the Court over and over again, has asked for the indulgence of the Court, has agreed to the day in which the case should be heard, and then only takes the objection to the jurisdiction after judgment has been given against him. It was contended by the defendant, in support of his objection that the appointment of the deputy judge was bad, that the county court judge had no power to sever his office and appoint different deputies for the different portions. No doubt the judge may appoint a deputy for the whole "county court district" for which he was himself appointed. But I can find nothing in the Act to prohibit him from appointing a deputy to act for one or more of the county courts included within the larger area. On the contrary, s. 21, to which we were referred by the Solicitor-General, expressly recognizes that he may do so. It provides that the deputy, upon the death of the judge who appointed him, "shall continue to act in all the Courts to which he was appointed." Those latter words necessarily import that he may be lawfully appointed to act for some of the Courts in the district and not for others, for if he could only be lawfully appointed for the whole county court district they would be

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altogether superfluous. Then if one deputy can be appointed to act for a single Court, as distinguished from the whole county court district, there is no objection to appointing another deputy at the same time to act for another Court in the district.

I am of opinion, therefore, that there is nothing in the defendant's objection to the appointments of these gentlemen, that they were within the powers given by the Act of Parliament, and that these rules must be discharged.

WILLS J. and DARLING J. concurred.

Solicitor for the applicant: *R. W. Beckwith.*

Solicitor for the deputy judge: *Solicitor to the Treasury.*

J. F. C.

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Nov. 10.

Revenue—Carriage Tax—Exemptions—Customs and Inland Revenue Act, 1888 (51 & 52 *Vict.* c. 8), *s.* 4, *sub-s.* 3.

A vehicle is not exempt from the carriage tax under s. 4, sub-s. 3 of the Customs and Inland Revenue Act, 1888, unless it is solely "constructed or adapted for use . . . . for the conveyance of any goods or burden in the course of trade or husbandry." It is not enough that it is in fact solely used for that purpose if it is constructed or adapted for use for other purposes as well.

Dictum to the contrary in *Hanworth* v. *Williams*, (1903) 67 J. P. 315, dissented from.

CASE stated by justices for the city of Liverpool.

An information was laid by the appellant, an officer of inland revenue, against the respondent, charging that he, on February 9, 1905, at the city of Liverpool, did keep a carriage for the keeping of which a licence was required by the statute in that behalf without having a proper licence under the said statute.

At the hearing of the information the appellant proved that on February 9, 1905, he saw the respondent in the said city driving a pony attached to a vehicle which he the appellant described as a governess cart. It was of the well-known type of such a vehicle, having cushions. There were no goods in the

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cart. The respondent's witnesses proved that the vehicle was used by him solely for the purpose of his business, that of a general broker and wardrobe dealer. He never used it for pleasure on Sunday or on any other day. He generally took a buyer with him in it when he was purchasing goods at private houses. He never used it to solicit orders nor for collecting debts, and only drove in it to private houses to call for and bring away goods after receiving orders. He had had the carriage specially strengthened to go long distances, as his business called him to different parts of Lancashire and Cheshire. His name, with the word "Liverpool," was painted on the shaft of the carriage in letters over one inch long.

The appellant contended that the vehicle did not come within the exception of "a waggon, cart, or other such vehicle, constructed or adapted for use and used solely for the conveyance of any goods or burden in the course of trade or husbandry" (1), and cited the case of *Hanworth* v. *Williams* (2), in support of his contention.

The justices were of opinion:—

(*a*) That the vehicle was adapted for use for the conveyance of goods in the course of the respondent's trade;

(*b*) That the vehicle was used solely in connection with the respondent's trade;

(*c*) That the real use of the vehicle under ordinary circumstances was for the conveyance of goods in the course of the respondent's trade;

(*d*) That it would be unduly straining the excepting words of the statute if their meaning precluded the vehicle being used at any time and under any circumstances for any other purpose than the conveyance of goods;

(1) By the Customs and Inland Revenue Act, 1888, s. 4, sub-s. 1, certain duties are payable in respect of carriages.

By sub-s. 3: "In the construction of this section . . . . 'carriage' . . . . shall not include a waggon, cart, or other such vehicle which is constructed or adapted for use, and is used, solely for the conveyance of any goods or burden in the course of trade or husbandry, and whereon the Christian name and surname, and place of abode, or place of business of the person . . . . keeping the same shall be visibly and legibly painted in letters of not less than one inch in length."

(2) 67 J. P. 315.

(*e*) That a strictly literal construction of the words in the exception would forbid the vehicle being used at all when empty without a licence;

(*f*) That it was a question of fact for them to decide whether the vehicle in question came within the exception referred to.

And they accordingly dismissed the information subject to a case for the opinion of the Court.

Sir Robert Finlay, A.-G., and *Rowlatt*, for the appellant. The justices ought to have held that this vehicle was not exempt from the carriage tax upon each and all of three different grounds. In the first place, it was not a "waggon, cart, or other such vehicle." The words "other such vehicle" must refer to something ejusdem generis with a waggon or cart, and do not include a light carriage of this description. In *Danby* v. *Hunter* (1) it was held that a light two-wheeled spring cart was not a "waggon, cart, or other such carriage" within the meaning of s. 76 of the Highway Act, so as to render the owner liable to a penalty for using it on the highway without having his name painted on it, on the ground that it was not ejusdem generis with a waggon or cart, terms which pointed to vehicles capable of carrying a considerable weight. Secondly, it was not "constructed or adapted for use . . . . solely for the conveyance of any goods, &c." It is not enough that it should be adapted for the conveyance of goods in the sense of being capable of carrying them, for every vehicle is so adapted in that sense: *Hanworth* v. *Williams*. (2) It must either have been originally constructed for the purpose of carrying goods, or must have received some structural alteration or fitting to make it suitable for that purpose; and moreover it must have been so constructed or adapted as to make it suitable for that purpose and for no other. The word "solely" must be read along with the words "constructed or adapted for use" as well as with the words "and is used." If it had been intended to be read along with the latter words only, the sentence would have run "and is solely used." The dictum to the contrary upon this point in *Hanworth* v. *Williams* (2) ought not to be followed,

(1) (1879) 5 Q. B. D. 20. (2) 67 J. P. 315.

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That the Legislature meant to confine the exemption to vehicles which were solely constructed or adapted for the carriage of goods as well as solely used for that purpose is clear from the fact that the Revenue Act, 1869 (32 & 33 Vict. c. 14), s. 19, sub-s. 6, did not require the vehicle to be constructed for a trade purpose to bring it within the exempted class. The words "constructed or adapted for use" occur in the present Act for the first time, and impose a fresh condition of exemption. Thirdly, the vehicle must be solely used for the carriage of goods, &c. How strictly that provision is to be interpreted appears from s. 6 of the Customs and Inland Revenue Act, 1872 (35 & 36 Vict. c. 20), which provided that a waggon or cart should not lose its exemption by reason of its being used for the purpose of conveying the owner or his family to church on Sunday, "provided that such waggon or cart is otherwise solely used for the conveyance of burden in the course of husbandry." Here the respondent used his vehicle for the purpose, amongst others, of going to houses to take orders.

No counsel appeared for the respondent.

LORD ALVERSTONE C.J. In my opinion this appeal must be allowed. To the first of the Attorney-General's three contentions, namely, that the vehicle must, in order to come within the exception, be something ejusdem generis with a waggon or cart, I am not prepared to assent. I do not think the question of liability to taxation was meant to depend upon the weight of the vehicle. But with his other two contentions I entirely agree. In my opinion the meaning of the section is that the vehicle must be constructed or adapted solely for use for the conveyance of goods or burden, as well as solely used for that purpose. The word "solely" is to be read with both limbs of the sentence. I think the Attorney-General was right when he said that the effect of the alteration of the language in the Act of 1888 was to impose a new condition of exemption from taxation. In the case of *Hanworth* v. *Williams* (1) I was misled in the course of the argument into expressing a contrary opinion upon this point, but that opinion was not necessary to the decision, and upon reflection I think it was not correct. Then the meaning of the section being

(1) 67 J. P. 315.

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what I have said, it seems clear that the magistrates have not properly applied the law. Then the third point was that the vehicle must be solely used for the conveyance of goods, &c. And upon this point also the magistrates have gone wrong. They have found that "the vehicle was used solely in connection with the respondent's trade." But that is not enough, those are not the words of the section. Then, again, they find that "the real use of the vehicle under ordinary circumstances was for the conveyance of goods." But the section requires not that the vehicle should be substantially used for that purpose, but that it should be solely so used. And when we look at the evidence upon which the findings were based, it was obvious that the respondent at the time that he went to a house to make purchases did not know whether he would find any goods which he would take away. The case must go back to the magistrates with direction that this vehicle is, under the circumstances, liable to taxation.

WILLS J. I am of the same opinion. I think the grammatical construction of the section requires that we should read the word "solely" with both branches of the sentence, and that it should be understood as limiting the construction or adaptation of the vehicle as well as the use. For as the Attorney-General observed, if it were intended to limit the use only, the natural way of expressing that would have been to say "is solely used." That order of the words would have excluded all doubt as to the meaning. Any expression of opinion which fell from the Court in the case of *Hanworth* v. *Williams* (1), and which may conflict with this view, was obiter dictum only, and therefore not binding upon us here.

DARLING J. I am of the same opinion. The section in question is not very carefully drawn, and to that fact is to be attributed the dictum in the case to which we were referred, a dictum which, however, was unnecessary to the decision. It seems to me that, upon the facts found here, it is plain that the vehicle was not used solely for the conveyance of goods, indeed, I doubt if it was mainly used for that purpose. This man, when he went

(1) 67 J. P. 315.

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to a house, did not know for certain whether he was going to buy any goods or not, for if the price asked was too high, of course he would not buy. I am of opinion that this was a vehicle of the kind which the Legislature intended to tax.

Appeal allowed.

Solicitor for the appellant : *Solicitor to the Inland Revenue.*

J. F. C.

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Nov. 6, 28.

THE KING *v.* DAVIES.

Contempt of Court—Publication tending to prejudice Fair Trial—Contempt of Inferior Court—Jurisdiction of King's Bench Division to attach for.

The King's Bench Division has power to punish by attachment contempts of inferior Courts.

Where, a person having been charged at the petty sessions with an indictable offence triable either at the assizes or at quarter sessions, matter is published in a newspaper tending to interfere with the fair trial of the charge, the King's Bench Division has jurisdiction to attach the publisher of such matter for contempt of Court, notwithstanding that at the time of the publication it is uncertain whether the person charged, if committed at all, will be committed to the assizes or to the quarter sessions.

RULE for a writ of attachment for contempt of Court.

On September 2, 1905, one Henrietta Hunter was arrested on a charge of abandoning an infant child at Morriston, near Swansea. She was brought before the justices at the Swansea Police Court on September 5, and remanded from time to time until October 11, when, a charge of attempted murder of the child having in the meantime been preferred against her, she was committed for trial to the next Glamorganshire Assizes on the latter charge. On September 5, September 8, September 9, and September 12, there were published in the *South Wales Daily Post*, a newspaper having a wide circulation in the county of Glamorganshire, certain paragraphs, headed "Traffic in Babies" and "Baby Farming Sensation," reflecting upon the character and antecedents of the accused, and alleging that Henrietta Hunter's real name was Dora Johnstone, under which name, it was alleged, she had more than once been

convicted at Bristol. At the dates when the said paragraphs were published the only charge against Henrietta Hunter was that of abandoning the child; the charge of attempted murder was not preferred until September 27. On November 6 a rule was obtained on behalf of the accused woman calling on David Davies, the editor, printer, and publisher of the said newspaper, to shew cause why a writ of attachment should not issue against him for publishing the said paragraphs, which were calculated to prejudice her upon her trial.

Bankes, K.C., and *Ellis Hill*, for Davies, shewed cause. The Court has no jurisdiction to attach in this case, for the publication complained of was not necessarily a contempt of the High Court; and its jurisdiction in this respect is limited to contempts of itself, and does not extend to contempts of inferior tribunals. In *Rex* v. *Parke* (1), where a person was charged before the petty sessions with forgery, which is triable only at the assizes, and matter was published tending to interfere with the fair trial of the charge, it was held that the High Court had jurisdiction to commit the publisher for contempt, although at the time of publication the person charged had not yet been committed for trial; but it was so held upon the ground that the case was one which must eventually be tried before the High Court, the commissioners of assize being, by the provisions of the Judicature Act, made a branch of that Court. But here, at the time of the publication, the only offence charged against the woman was that of abandoning the child, an offence which was triable at the quarter sessions, and consequently the case was one which might never come before the High Court at all. This question, whether the High Court has jurisdiction to protect the administration of justice in inferior Courts, in cases which might never come before it at all, by proceedings for contempt, was expressly left open in *Rex* v. *Parke*. (1)

Vaughan Williams, in support of the rule. To give the Court jurisdiction it is enough to shew that the case is one which may come before it, not that it is one which must. Here the accused woman might have been committed either to the sessions or to

(1) [1903] 2 K. B. 432.

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the assizes, or having been committed to the quarter sessions, might still be tried by the judge of assize if the assizes were held first. Or, again, the case might be removed into the High Court by certiorari. The jurisdiction is given to protect the administration of justice generally. Sufficient protection is not afforded by the less speedy remedies of indictment or criminal information.

Cur. adv. vult.

Nov. 28. The judgment of the Court (Lord Alverstone C.J., Wills and Darling JJ.) was delivered by

WILLS J. This is an application to commit the defendant for contempt of Court. The circumstances which have given rise to it are as follows: A woman was arrested on September 2, 1905, on a charge of abandoning a child at Morriston, in the county of Glamorgan. She was brought before the magistrates at Swansea on September 5. The defendant is the editor, printer, and publisher of the *South Wales Daily Post*, a newspaper published at Swansea. In the issue of the paper published on the evening of September 5 there appeared a report of the proceedings before the justices, followed by a statement headed "Antecedents of the Accused," and in the issue of September 8 another article entitled "Traffic in Babies," and in the issues of September 9 and 12 further articles relating to the accused person. They contained a great number of statements calculated to give an exceedingly unfavourable impression of the prisoner, and notably the article of September 8 stated that she had been guilty of wholesale child farming, and alleged her identity with one Dora Johnstone, who, it was alleged, had more than once been convicted of fraud; but it is not necessary to give any more specific account of their contents, as Mr. Bankes, who appeared for the defendant, admitted that nothing could be said in defence or even in palliation of the act of publishing such articles concerning a person under remand upon a charge which might lead to her committal. He confined his argument to denying the jurisdiction of this Court to deal with the present application, on the ground that as the crime charged could be tried at quarter sessions the publication was an offence against the

quarter sessions, and could not be dealt with summarily by this Court.

It would perhaps be enough to say that, inasmuch as the question whether the committal should take place to the assizes or quarter sessions depended in all probability upon the mere accident of which tribunal might hold its sittings before the other, it was just as much a contempt of the assize court as of quarter sessions, and, if so, our judgment in *Rex* v. *Parke* (1) applies. We adhere to the view we expressed in that case that the publication of such articles is a contempt of the Court which ultimately tries the case after committal, although at the time when they are published it cannot be known whether there will be a committal or not. Their tendency is to poison the stream of justice in that Court, though at the time of their publication the stream had not reached it; and as such articles are calculated to interfere with the power of the Court (whatever it be) that tries the case to do effective justice, it is a contempt of any Court which very well may try the case, but in fact does not do so, as well as of the Court which actually tries it.

What actually happened was that ultimately, some time after the publication of the articles now complained of, the prisoner was committed on a charge of attempting to murder the child who was the subject of the original charge, and of course upon such a charge she was committed to the assizes. We think that although the original charge has been altered, it is still intimately connected with the original charge, and relates to the same subject-matter, that the articles in question are equally calculated to prejudice the fair trial of the accused, whatever form the charge might ultimately take, and that their publication does constitute a contempt of the assize court to which the woman has been committed. It matters not whether the uncertainty at the time the articles were published extended only to the forum to which the case should be sent, or to the question whether a committal would take place at all, or to both. In each of such cases the mischief is the same, and the Court which might have to try the case would find its authority undermined beforehand.

We think it right to repeat in this connection a passage in the

(1) [1903] 2 K. B. 432.

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judgment in *Rex* v. *Parke* (1), which expresses the deliberate opinion of the Court as constituted when this case was argued, as well as of the Court as constituted when *Rex* v. *Parke* (1) was decided: "It has been argued, however, that publication of articles of the kind in question cannot be treated as a contempt of the assize court unless the committal has actually taken place and a bill been found, when only, it is urged, is there a case pending in the assize court, and when it is also urged the jurisdiction ought to be exercised by that Court itself. A moment's consideration, it seems to us, is sufficient to dispose of such a proposition. The reason why the publication of articles like those with which we have to deal is treated as a contempt of Court is because their tendency and sometimes their object is to deprive the Court of the power of doing that which is the end for which it exists—namely, to administer justice duly, impartially, and with reference solely to the facts judicially brought before it. Their tendency is to reduce the Court which has to try the case to impotence, so far as the effectual elimination of prejudice and prepossession is concerned. It is difficult to conceive an apter description of such conduct than is conveyed by the expression 'contempt of Court.' If it be once grasped that such is the nature of the offence, what possible difference can it make whether the particular Court which is thus sought to be deprived of its independence, and its power of effecting the great end for which it is created, be at that moment in session or even actually constituted or not? It is perfectly certain that by law it will and must be constituted, and that when constituted it and it alone can take cognizance of the particular offence which is the subject of the preliminary inquiry. The wrong can hardly be the less, because the purpose or the tendency of the act complained of is that the assize court never shall have undisturbed power to fulfil its functions satisfactorily. The High Court exists always. To provide beforehand that one of its branches, which, although it does not at the moment exist, yet must, both according to immemorial custom, and now also by statutes and rules having the same effect, come into existence, shall be hampered and hindered in the effectual discharge of its duties as soon as it is constituted, if called upon

(1) [1903] 2 K. B. 432.

to try a particular case which it is at all events proposed to bring into that Court, is surely an offence against the High Court itself." (1) It is true that in the case of *Rex* v. *Parke* (2) the only uncertainty was whether the accused person would be committed to any Court, the offence charged being one which in case of committal must go to the assizes. We cannot see that the additional element of uncertainty that the case could be tried at quarter sessions makes any difference in principle, or prevents the interference with the due course of justice in a case which may come to the assizes from being a contempt of that Court, and we are of opinion that upon these grounds alone the present application ought to be granted.

But, inasmuch as a further question of great and growing importance, namely the jurisdiction of this Court to treat attacks of this kind upon the independence and usefulness of inferior tribunals as offences to be dealt with brevi manu by this Court in its summary jurisdiction, has been argued, we think it desirable to deliver our judgment upon this point also, and to treat the case as if a committal had actually taken place to quarter sessions. The present King's Bench Division of the High Court stands in the place of the three ancient Superior Courts of Common Law, and besides representing the powers and exercising the authority of the Courts of Common Pleas and Exchequer inherits all the jurisdiction and powers of the Court of King's Bench. From the most ancient times that Court exercised functions which belonged to no other Court in the kingdom. The high nature of these functions are described in emphatic language by Lord Coke in the Fourth Institute, c. 7, on "The Court of King's Bench," and in Hawkins' Pleas of the Crown under the same title, Bk. 2, c. 3, to which we refer only to shew the supreme place in the judicature assigned to that Court. There is no doubt that the great functions of this Court as of all others must be exercised, as pointed out by Lord Coke, "according to due course of law." His general attribution to it of the power to "correct . . . . errors and misdemeanours extra judiciall tending to the breach of the peace or oppression of the subjects . . . . or any other manner of misgovernment," as well as Hawkins' wider and

(1) [1903] 2 K. B. 436—437. (2) Ibid. 432.

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more elaborate description of the like powers, refers to every kind of misdemeanour, including those which are properly the subject of indictment or criminal information as well as those which are punishable summarily by attachment, and therefore throw no light upon the question whether a particular offence falls under the one head or the other, or both. They do serve to shew the very great trust reposed in the Court of King's Bench in respect of its control and superintendence of all inferior Courts, and that it is in a special manner the guardian and protector of public justice throughout the kingdom.

Offences of the exact kind in question in this case are necessarily of modern origin. They could not exist to any appreciable extent, if at all, before printing was freely resorted to; and as long as it was unlawful even to publish reports of proceedings before magistrates, on account of their supposed tendency to interfere with a fair trial, persons who knew that this was unlawful were not very likely to go to the further length of announcing and commenting upon supposed facts, to the prejudice of a prisoner, which had not even come before the magistrates. Down to 1792 the judge at the trial determined as a matter of law whether a particular writing was a libel or not, and, looking to the legal definition of a libel, it is obvious that writers of all kinds stood in far greater danger than they have done since the Act of 32 Geo. 3, c. 60; and for a long time after that there is no doubt that persons who published libels of any kind were in more peril than at present.

We have pointed out in the judgment in *Rex* v. *Parke* (1), that from 1811 to 1888 but one case has been recorded in which the publication of reports of proceedings before justices tending to committals, or of extraneous matter connected with such reports, has come under judicial cognizance. That case occurred in 1886, and for reasons which we will give later on we are of opinion that little reliance can be placed upon it. We mention these facts to show how impossible it is that precedents earlier than some twenty years ago for cases like the present can be found or expected; and if there is no great amount of direct authority in favour of the view that such an offence is summarily punishable by this Court, it is all events conceded by Mr. Bankes

(1) [1903] 2 K. B. 438.

that he has been able to find none to the contrary. We are therefore driven to consider the question in the first instance from the point of view of principle, and in the second in the light of the reported cases during the last twenty years, with such small help as can be gathered from older authorities.

There is no doubt that almost all the cases of contempt of Court to be found in the books are cases in which the act so called and so dealt with has been some act in defiance of one of the Superior Courts, in which case, of course, no one of those Courts interfered with the other. Each of the three Courts of Common Law, and also the Court of Chancery, possessed ample powers to protect itself, and to punish conduct which it deemed to be so derogatory of its own authority as to constitute a contempt of Court. It is very natural, therefore, that the language generally used in such cases should refer to the power of the Superior Court to ensure respect for itself and its orders, and should not go beyond that. The almost total absence of any recorded case in which a contempt of an inferior Court has come into question is an abundant proof that serious offences of this kind were very rare. They were also always punishable by indictment, and in old days, when the means of communication were slow, and uncertain, and expensive, there was an inducement to refrain from appealing to the Court of King's Bench which no longer exists. In these circumstances the absence or scantiness of precedent is not to be wondered at, and in this connection we may cite a passage from Hawkins' Pleas of the Crown, Bk. 2, c. 3, in which, speaking of the Court of King's Bench, after a general description of the jurisdiction of the Court to prevent abuses and oppression, he says, s. 4: "Neither is it necessary in a prosecution of any such offence in this Court to show a precedent of the like crime formerly punished here, agreeing with the present in all its circumstances, for this Court being the custos morum of all the subjects of the realm, wherever it meets with an offence contrary to the first principles of common justice, and of dangerous consequence to the public, if not restrained, will adapt such a punishment to it as is suitable to the heinousness of it"—observations which are as applicable to the exercise of summary jurisdiction as to the proceeding by indictment.

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What then is the principle which is the root of and underlies the cases in which persons have been punished for attacks upon Courts and interferences with the due execution of their orders? It will be found to be, not the purpose of protecting either the Court as a whole or the individual judges of the Court from a repetition of them, but of protecting the public, and especially those who, either voluntarily or by compulsion, are subject to its jurisdiction, from the mischief they will incur if the authority of the tribunal be undermined or impaired. See the judgment prepared by Wilmot C.J. in *Rex* v. *Almon* (1765), but not delivered because the case was allowed to drop: Wilmot's Opinions, p. 256. The word "authority" is used by him to express "the deference and respect which is paid" to the judges of a Court and their acts "from an opinion of their justice and integrity." These words are apt with respect to the particular case with which he was dealing. But what possible difference in principle can there be in respect of direct attacks upon Courts or judges, and of writings, the tendency of which is to deprive the inferior Courts beforehand of the possibility of doing even-handed and impartial justice according to the due course of law? To hold that there was a distinction would give colour to the notion, which cannot be too strongly repudiated, that the offended dignity of a particular Court, or of the persons who compose it, is the subject of punishment in such a case. "The object of the discipline enforced by the Court in case of contempt of Court," says Bowen L.J. "is not to vindicate the dignity of the Court or the person of the judge, but to prevent undue interference with the administration of justice": *Helmore* v. *Smith* (1); and a considerable part of the undelivered judgment of Wilmot C.J. to which we have referred is devoted to shewing that the real offence is the wrong done to the public by weakening the authority and influence of a tribunal which exists for their good alone. He adds that such conduct is pre-eminently the proper subject of summary jurisdiction. Attacks upon the judges, he says, "excite in the minds of the people a general dissatisfaction with all judicial determinations . . . . and whenever men's allegiance to the laws is so

(1) (1886) 35 Ch. D. 449, 455.

fundamentally shaken, it is the most fatal and dangerous obstruction of justice, and in my opinion calls out for a more rapid and immediate redress than any other obstruction whatsoever; not for the sake of the judges as private individuals, but because they are the channels by which the King's justice is conveyed to the people. To be impartial and to be universally thought so are both absolutely necessary for the giving justice that free, open, and unimpaired current which it has for many ages found all over this kingdom." (1) With a few verbal alterations those eloquent words will apply with at least equal force to writings, the direct tendency of which is to prevent a fair and impartial trial, or at least one that can be so considered, from being had in Courts of inferior jurisdiction which have not the power of protecting themselves from such encroachments upon their independence. The public mischief is identical, and in each instance the undoubted possible recourse to indictment or criminal information is too dilatory and too inconvenient to afford any satisfactory remedy. It is true that the summary remedy, with its consequent withdrawal of the offence from the cognizance of a jury, is not to be resorted to if the ordinary methods of prosecution can satisfactorily accomplish the desired result, namely, to put an efficient and timely check upon such malpractices. But they do not. "I am," said Wilmot C.J., "as great a friend to trials of facts by a jury, and would step as far to support them as any judge who ever did or now does sit in Westminster Hall, but if to deter men from offering any indignities to Courts of justice," and we may well add, from interfering with the due course of justice, "it is a part of the legal system of justice in this kingdom that the Court should call upon the delinquents to answer for such indignities," to which we add, misconduct, "in a summary manner by attachment, we are as much bound to execute this part of the system as any other." The several parts of the system, he adds, "act in combination together to attain the only end and object of all laws, the safety and security of the people," words which, it appears to us, are as appropriate to the question we have in hand as they were in the case with which he was dealing, to the application under

(1) Wilmot's Opinions, pp. 255—256.

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different circumstances of the same great principle, that Courts or the administration of justice exist for the benefit of the people, that for the benefit of the people their independence must be protected from unauthorized interference, and that the law provides effective means by which this end can be secured. If it is to be secured at all in the case of the inferior Courts it can only be secured by the action of this Court, for they have not the power to protect themselves; and if it be true that the King's Bench is in any sense the custos morum of the kingdom, it must be its function to apply with the necessary adaptations to the altered circumstances of the present day the same great principles which it has always upheld. "Law," to use the words of Lord Coleridge, "grows; and though the principles of law remain unchanged, yet (and it is one of the advantages of the common law) their application is to be changed with the changing circumstances of the time." (1)

The truth is that the constant use of the term "contempt of Court," owing to the fact that in the vast majority of cases the particular offence in question was an actual and direct setting at defiance of the orders of the Superior Court appealed to, in which cases the phrase "contempt of Court" has been strictly and in the narrowest sense its apt description, and its indiscriminate application to all the Superior Courts, has tended to obscure both the foundation and object of the jurisdiction, and to throw into the shade the essential difference between the jurisdiction exercised by the Court of King's Bench and that of the other Courts, which possessed none of the relations with the inferior Courts which have always appertained to the King's Bench. The preservation of the purity of the stream of justice in the case of the other Courts could affect no other Court than that which was exercising the jurisdiction. They were not the custodes morum (to use Hawkins' phrase) in any sense analogous to that which the phrase bears when applied to the King's Bench, whose

(1) The quotation is from the summing-up in *Reg.* v. *Foote and Another*, upon the trial of an indictment for publishing a blasphemous libel. The case was tried at Nisi Prius July 7, 1883, and the summing-up was published by Lord Coleridge, as appears from the preface, in the form of a separate pamphlet. The passage cited is from p. 11 and p. 12. The summing-up is also reported in 48 L. T. 733, 735.

peculiar function it was to exercise superintendence over the inferior Courts and confine them to their proper duties. This, however, as it seems to us, was only one exercise of the duty of seeing that they did impartial justice, and if and when the attainment of that end required that the misdeeds of others should be corrected as well as the misfeasances of the inferior Courts themselves, it seems to us that it is no departure from principle, but only its legitimate application to a new state of things, if others whose conduct tends to prevent the due performance of their duties by those Courts have to be corrected as well as the Courts themselves.

We proceed to examine the very few authorities bearing upon the subject closely enough to be of any value, so far at least as we have been able to discover them. Of old cases of this character we have found but two, *Burgh* v. *Blunt* (1), and *Rex* v. *Burchett*. (2) *Burgh* v. *Blunt* was heard in H. T. 3 Geo. 1 (1717). It was a motion for attachment against the judge of the Court of Holdernesse for disobeying a *tolt*, whereby the cause was to have been removed into the county court, from whence, as Serjeant Chesshyre, who moved the rule, "believed, the parties" according to the report "designed by a *pone* to remove it into the Court of Common Pleas; and though by a *recordare* it might have been removed at once into the Court of Common Pleas, yet the parties might take this way if they pleased." He urged that disobedience to the tolt was a contempt of the law of the land over which the King's Bench were guardians, that that Court had a general jurisdiction over inferior Courts, and was to take care not only that they did not transgress their jurisdiction, but likewise that they proceeded regularly in matters confessedly within their jurisdiction. The Court evinced some reluctance to grant the rule, Eyre J. observing that the proper course was to proceed in the first instance by mandamus, and Parker C.J. pointing out that prohibition or a writ of false judgment would be effective remedies; but upon a statement by Serjeant Page, that a rule in the like case had been granted to him in *Rex* v. *Langston*, granted the rule. What became of it does not appear.

It will be observed that no attempt was made to shew that

(1) (1717) 10 Mod. 349. (2) (1722) 1 Str. 567.

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the disobedience was contumelious. The Court was evidently disposed to treat it as an error of the inferior Court, which must have been the Court of a wapentake, hundred, or lordship. The nature of the writ of tolt appears from Fitzherbert's Nat. Brev. 3 F. It was a writ issued by the sheriff of the county to remove the plaint into the county court. It was a writ which the plaintiff might have as a matter of course, and the defendant only upon cause shewn. The pone was a writ which is also described in Fitzherbert in a number of passages to which reference will be found in the index. It and the recordare were both writs to remove a case from an inferior Court into the Court of Common Pleas. Both were obtainable in many instances by the plaintiff without shewing cause, by the defendant upon cause shewn, and in some instances either plaintiff or defendant had to shew cause. As both parties were stated to be willing to remove the case into the Common Pleas, and it is not stated that it was one of the exceptional cases in which the plaintiff had to shew cause, it is not surprising that the Court was inclined to treat it, as it would certainly be treated in like circumstances by this Court, as an unnecessary application, and was disposed to refuse it. If it is to be taken as suggesting that the Court of King's Bench will in no case interfere in such a case, it is contrary to a great body of ancient law. The Court of King's Bench may "award an attachment against any Court" (i.e., judge) "usurping a jurisdiction which does not belong to it, and putting the subject to unnecessary vexation by colour of a judicial proceeding wholly unwarranted by law and therefore prohibited by it": Hawkins' Pleas of the Crown, Bk. 2, c. 22, s. 25. He points out that it is more usual to award prohibition in the first instance, but mentions several analogous cases in which the attachment will go in the first instance. The case in 10 Mod. is so far removed from the case before us in its circumstances and in the principles involved that it cannot be regarded as any authority against the proposition contended for by the applicant in the present case.

Rex v. *Burchett* (1) occurred in T. T. 9 Geo. 1 (1722). The very meagre report is as follows: "The Court ordered an

(1) 1 Str. 567.

attachment nisi against the town clerk of Guilford and a defendant convicted on the Game Act for granting and suing out a replevin of goods distrained for the penalty. But on shewing cause the next term when Eyre J. only was present, he discharged the rule because it was only a contempt to the inferior jurisdiction of the justices, and in that case B. R. never interposes." It cannot be considered as a decision of any great weight. It is obvious that no question of general importance was involved in what had been done by the local Court, which was probably nothing more than a mistaken exercise of jurisdiction, more properly to be remedied by a prohibition than by attachment. But for what it is worth, it is the judgment of a single judge not necessarily that the jurisdiction did not exist, but that in the case of acts which could be treated *only* as contempts of magistrates, it was not the practice of the Court of King's Bench to interfere. The wider question whether, when, beyond the mere interference with the process of the magistrate's Court, there was involved the grave danger to the public of prejudicing the fair trial of a case to be heard in an inferior Court, the jurisdiction existed, cannot have been raised or the report could hardly have been so perfunctory, nor would it have been decided by a single judge. The circumstances of that case cannot be compared with those with which we have to deal; nor was there any appreciable risk of the class of inroads upon the independence of the inferior tribunals which the altered conditions of to-day have brought into prominence and which have made it necessary for us to consider very seriously and anxiously the nature of the jurisdiction we are asked to exercise and the principles upon which it is based.

The modern cases which throw any sort of light upon the question are three, and three only, of those enumerated, and from a somewhat different point of view discussed, in *Rex* v. *Parke*. (1) We have been unable to make any addition to the list. (2)

(1) [1903] 2 K. B. 432.

(2) There are a certain number of cases of this kind in respect of publications during the pendency of an election petition. They are for the most part reported as cases in the King's Bench Division; but it must be remembered that since 1880 that Division represents the old Court of Common Pleas, in which all election petitions, since they were transferred to the judges, had to be brought,

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We propose to state very shortly what these cases come to. They range only from 1886 to 1895, and it is necessary to premise that until the argument in *Rex* v. *Parke* (1) took place, and attention was called to the fact that the Central Criminal Court, under 4 & 5 Will. 4, c. 36, s. 1, sits by virtue of a general commission, and that by ss. 16 and 29 of the Judicature Act, 1873, it became a branch of the High Court, there had been a very general misapprehension, which was undoubtedly shared by the Court in several of the cases referred to, as to the position and rank of the Central Criminal Court, which had been looked upon as a Court of separate, if not also of inferior, jurisdiction. It is necessary to bear this in mind, because in that light alone can the decisions be duly estimated as bearing upon the present question. In two of the cases, in one of which proceedings were pending before the magistrates with a view to a committal to the Central Criminal Court, and in the other the prisoner had been committed to that Court, a rule against persons who had published articles calculated to prejudice the fair trial of the accused was refused. In the first case, before Lord Coleridge C.J. and Hawkins J., the Court treated it as clear that they had no jurisdiction : see 2 Times L. R. 351 and *Rex* v. *Parke*. (1) The case was heard in 1886. There is no report of the second case save a short notice in the *Law Journal* newspaper of January 4, 1896. In neither was there any serious argument, and none of the important considerations on which our judgment is based were advanced. It is said in the few lines in which the latter case is reported that the rule was refused on the ground of want of jurisdiction. It seems difficult to reconcile this statement with the fact that in the third of the three cases we have referred to (*Reg.* v. *Armstrong*, reported in *The Times* of May 9, 1894) Wright J., one of the judges who refused the rule in the case mentioned in the *Law Journal* newspaper, had said that he should pause long before coming to the conclusion that the Court had no jurisdiction in such a case, or with the fact that the Court allowed the rule to drop on an undertaking by the

and in dealing with them the King's Bench Division was only exercising the functions of the old Common Pleas, and not of the old King's Bench.—A. W.

(1) [1903] 2 K. B. 439.

defendant to pay the costs, a term which they could hardly have imposed had they thought that there was no jurisdiction.

The scanty reports of these cases, each of which relates to publications affecting cases committed or likely to be committed to the Central Criminal Court, do not explicitly state that the Central Criminal Court was treated as a Court of inferior jurisdiction, but we think it must have been so. All the matters complained of were acts done not in the face of the Court, and the effect of the Judicature Act of 1873 was not here brought to the notice of the Court.

It appears to us that the state of the authorities, such as they are, is such as to leave the question, as was pointed out in *Rex* v. *Parke* (1), entirely open for our decision. Our attention has been called to observations of Sir George Jessel M.R. in *Re Clements* (2), as to the necessity of caution in dealing with a matter where the liberty of the subject is concerned. Such considerations have been fully present to our minds, and certainly needed no authority to enforce them. It is because we think that we are creating no new jurisdiction, but acting strictly in conformity with the cardinal principles upon which the jurisdiction to commit for conduct tending to improperly interfere with the administration of justice rests, that we have come to the conclusion at which we have arrived. To confine the application of such principles to facts identical with or closely resembling those of preceding cases, and to hold that, because in times long gone by the chief, if not the only danger to be guarded against was the illegal exercise of arbitrary power by inferior Courts and their officers, therefore the power of this Court extends no further, and that the King's Bench cannot afford them protection as well as administer correction, would, we think, be to mistake the application of a principle for the principle itself. The mischief to be stopped is in the case of the inferior Courts identical with that which exists when the due administration of justice in the Superior Courts is improperly interfered with. The reason why the Court of King's Bench did not concern itself with contempts of the other Superior Courts was that they possessed ample means and occasions for protecting themselves. Inferior

(1) [1903] 2 K. B. 432. (2) (1877) 46 L. J. (Ch.) 375, 383.

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Courts have not such powers, although some of them, quarter sessions for example, try many more cases than are tried at assizes, and have a very extended and important jurisdiction. The danger is perhaps greater to them than it is to the Superior Courts of having their efficiency impaired by publications such as those which have given rise to the present proceedings. Thinking as we do that the application now before us asks for nothing more than the legitimate application to new circumstances of the old principles of the common law, we have come to the conclusion that we ought to grant the remedy invoked, and it remains only to consider the penalty that ought to be inflicted. We have again looked through the articles complained of; they contain a number of statements respecting the person charged of a character likely to seriously prejudice her case, to create a feeling against her, and to affect the minds of persons who might take part in her trial. In our opinion such a case demands a severe punishment. We order David Davies to pay a fine of 100*l.* and the costs of these proceedings.

Rule absolute.

Solicitors for the applicant: *Smith, Randall & Dods, for Harvey, Lloyd & Cross, Cardiff.*

Solicitors for Davies: *Soames, Edwards & Jones.*

J. F. C.

[IN THE COURT OF APPEAL.]

C. A. 1905 *Nov.* 10.

RISDON IRON AND LOCOMOTIVE WORKS *v.* FURNESS.

Company—Limited Liability—Company formed for purpose of Trading in Foreign Country—Personal Liability of Shareholders under the Foreign Law—Conflict of Laws.

An English company, incorporated under the Joint Stock Companies Acts as a limited company, was formed for the purpose of acquiring and working mines in (amongst other countries) the United States of America, and by the articles of association the directors were empowered to do all things necessary to comply with the requirements of the law of any country where the company might carry on business. The company acquired and worked mines in the State of California, and for the purposes of those mines purchased from the plaintiffs, manufacturers in California, certain machinery. By the law of California every shareholder of a company, whether incorporated in California or elsewhere trading within that State is personally liable for such proportion of the company's debts as the amount of his shares bears to the whole of the subscribed capital of the company. The company having become insolvent, the plaintiffs sued the defendant, a shareholder of the company, in this country for his proportion of the price of the machinery:—

Held, that the defendant did not by becoming a member of the company upon the terms of the memorandum and articles of association authorize the directors to pledge his personal credit for the price of the goods supplied, and that, in the absence of express authority on his part, the action could not be maintained against him.

Judgment of Kennedy J., [1905] 1 K. B. 304, affirmed.

APPEAL from a judgment of Kennedy J. on the argument of a point of law raised on pleadings, reported [1905] 1 K. B. 304.

The allegations of the statement of claim were to the following effect:—

The plaintiffs are a corporation incorporated under the laws of the State of California, in the United States of America, and carry on the business of general machinery manufacturers in that State.

The defendant is a shareholder in a company called the "Copper King, Limited," whose registered offices are in the city of London, and was at all material times the holder of shares in the company.

The Copper King, Limited, was registered as a joint stock

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company under the Companies Acts, 1862—1898, with a capital divided into shares of 1*l.* each, all of which was fully subscribed, and by its memorandum of association the objects for which the company was incorporated were (inter alia) :—

To acquire any copper or other mines in the United States of America, Australia, and elsewhere ;

To search for, crush, win, get, and prepare for market ore and mineral substances of all kinds ;

To purchase machinery and materials of every kind requisite for the purposes of the company ;

To carry out all or any of the foregoing objects in any parts of the world either as principals or agents ;

To do all other things incidental or conducive to the attainment of the above objects.

Under the articles of association the directors were empowered by art. 87 (L) to "do all such other things and take such steps as may be now or at any time become necessary so as to comply with any statutory enactment, rule, or regulation in any country, colony, or place where the company may carry on business, or where all or any part of the property and undertaking of the company may be situate."

Pursuant to the terms of the memorandum and articles of association, and until its bankruptcy and winding-up hereinafter specified, the Copper King, Limited, carried on business in the State of California.

Between September 30 and December 15, 1902, the plaintiffs, in accordance with contracts made by and between themselves and the Copper King, Limited, supplied and delivered machinery and goods to and did certain work and labour for the Copper King, Limited, at the price of $10,404·96. The Copper King, Limited, failed to pay the plaintiffs the said sum or any part thereof, and on February 4, 1903, the plaintiffs commenced an action against the Copper King, Limited, in the Superior Court of the city and county of San Francisco, in the United States of America, for the said sum.

In or about the month of June, 1903, and before the action had been tried, certain creditors of the Copper King, Limited, filed a petition in bankruptcy against the company, and subsequently

the company was adjudicated bankrupt according to the laws of the United States.

In consequence of the adjudication of bankruptcy the action and all further proceedings therein were stayed, and the costs and expenses which the plaintiffs had incurred were lost.

At an extraordinary general meeting held at the registered offices of the company the shareholders of the Copper King, Limited, passed a resolution that the company should be voluntarily wound up, and that resolution was duly confirmed.

By art. 12 of the Constitution of the State of California it is provided as follows:—

By s. 3 (so far as is material to this action), "Each stockholder of a corporation or joint stock association shall be individually and personally liable for such proportion of all its debts and liabilities contracted or incurred during the time he was a stockholder as the amount of stock or shares owned by him bears to the whole of the subscribed capital stock or shares of the corporation."

By s. 15, "No corporation organized outside the limits of this State shall be allowed to transact business within this State on more favourable terms than are prescribed by law to similar corporations organized under the laws of this State."

By s. 322 of the Civil Code of the State of California it is provided as follows:—

"Each stockholder of a corporation is individually and personally liable for such proportion of its debts and liabilities as the amount of stock or shares owned by him bears to the whole of the subscribed capital stock or shares of the corporation, and for a like proportion only of each debt or claim against the corporation. Any creditor of the corporation may institute joint or several actions against any of its stockholders for the proportion of his claim payable by each and in such action the Court must ascertain the proportion of the claim or debt for which each defendant is liable and a several judgment must be rendered against each in conformity therewith. If any stockholder pay his proportion of any debt due from the corporation incurred while he was such stockholder he is relieved from any further personal liability for such debt and if an action has

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been brought against him upon such debt it shall be dismissed as to him upon his paying the costs or such proportion thereof as may be properly chargeable against him. The liability of each stockholder is determined by the amount of stock or shares owned by him at the time the debt or liability was incurred, and such liability is not released by any subsequent transfer of stock. . . . . In corporations having no capital stock each member is individually and personally liable for his proportion of its debts and liabilities and similar actions may be brought against him either alone or jointly with other members to enforce such liability as by this section may be brought against one or more stockholders and similar judgments may be rendered. The liability of each stockholder of a corporation formed under the laws of any other State or Territory of the United States, or of any foreign country, and doing business within this State shall be the same as the liability of a stockholder of a corporation created under the constitution and laws of this State."

The Copper King, Limited, so carrying on business as aforesaid in the State of California, and the defendant as a member and shareholder, became and were subject to the laws of the State. The defendant as a shareholder is personally liable for the sum of 405*l.* 15*s.*, being the proportion of the debts of the Copper King, Limited, that the amount of his shares therein bears to the total subscribed capital of the company.

The defendant pleaded (inter alia) that the statement of claim disclosed no cause of action.

At the hearing judgment was given for the defendant. (1)

The plaintiffs appealed.

M. Lush, K.C., and *Ernest Pollock, K.C.*, for the plaintiffs. The defendant was a shareholder in a company registered in California, and subject to the law of that State, which creates a personal liability on the part of individual members of the company for its debts. There was therefore created a transitory cause of action, and the defendant can be sued in England. If he had been sued in California, and judgment obtained against

(1) [1905] 1 K. B. 304.

him, he would have been liable in an action in these Courts on that judgment, and the same result should follow if he is sued in these Courts in the first instance. The defendant cannot be called upon to contribute to the company of which he is a member beyond the agreed limit, but he authorized the company to act as his agent to bind his credit. This is the necessary consequence of the liberty given to the company to trade in California. A person dealing with the company in California would act with knowledge that the law of that State created a personal liability on the shareholders of the company, and in these circumstances privity of contract existed between the plaintiffs and the defendant. In *Bank of Australasia* v. *Harding* (1) the liability arose because the company was carrying on business under the protection of the colonial laws. It did not matter whether the shareholder had notice as to what those laws were; his liability was enforceable because the colonial law constituted the chairman, when being sued, an agent for the members of the company, and when his liability was established, by judgment recovered against him, the liability of the shareholders to contribute followed and was enforceable in this country. The cases of *Bank of Australasia* v. *Nias* (2) and *Copin* v. *Adamson* (3) also shew liability on the part of a shareholder without its being necessary to prove notice to him of the laws of the foreign State in which the company is carrying on business. It is sufficient to shew that by the memorandum and articles it was contemplated that the company should carry on business in California, and that fact gave authority to register the company there so as to create liability to the laws of that State. The defendant, in fact, made the company his agent to incur legal liabilities on his behalf. The memorandum of association is certainly wide enough to support this argument, for it includes power to do "all other things incidental or conducive to the attainment of the above objects," that is, the carrying on of the business of the company in, among other parts of the world, the State of California. In Lindley on Companies, 6th ed., vol. ii., p. 1222, it is said, "The

(1) (1850) 9 C. B. 661. (2) (1851) 16 Q. B. 717.
(3) (1874) L. R. 9 Ex. 345.

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right of a corporation to sue in a foreign country, as well as its right to contract in a foreign country, are both based, not on the law of the State creating the body corporate, but on the extent to which the foreign State chooses to recognize that law"; but the author adds, "It is curious, however, that this point should never have been discussed or formally decided in this country." Therefore the company when trading in California should be treated as reincorporated there and subject to Californian law, and not as a company subject to limitations imposed by English law. A reference to this matter is also to be found in Story on Conflict of Laws, 8th ed., s. 106, note, where the restrictions are given which are imposed by various countries as a condition of the ability of a corporation to trade within the limits of those countries. In view of the fact that the defendant has authorized the directors of the company to take such steps as may be necessary to comply with the law of any country in which the company carries on business there is no inconsistency between the limited liability in this country, as between the company and its shareholders, and the statutory liability imposed by the law of California on the shareholders in respect of debts of the company. The case of *Pinney* v. *Nelson* (1) is in point. The learned judge in the Court below overlooked a passage at p. 146 of the report, which shews that under the laws of the State of Colorado there was a limitation of the liability of the shareholders of the company. The company was incorporated in that State, and one of its purposes was expressed to be to carry on business in the State of California. It did so and incurred liabilities, and it was held that the contract of the shareholders inter se must be assumed to have been made with reference to the laws of California, which make a shareholder liable for his proportion of the debts of his company. It can make no difference, considering the wide terms of the liberty to trade in foreign countries in the present case, that the State of California is not specifically mentioned. There was a sufficiently definite submission to the law of California, and under that law the defendant incurred the liability on which he is sued in this action.

(1) (1901) 183 U. S. 144.

[They cited also *Lloyd* v. *Guibert* (1) and *Mostyn* v. *Fabrigas*. (2)]

J. A. Hamilton, K.C., and *Leck*, for the defendant, were not called on to argue.

COLLINS M.R. This is an appeal from a judgment of Kennedy J. upon what is the modern substitute for a demurrer, and a question of law has to be decided before the facts of the case are definitely ascertained. We have, therefore, to decide the point upon the facts as they are stated in the pleadings. It appears that the defendant was a member of a limited company registered under the Companies Acts, 1862—1898, and among other objects for which the company was incorporated were—to acquire copper mines in any part of the world, including the United States of America, to search for the mineral, and to purchase machinery and materials of every kind requisite for the purposes of the company. In carrying out these objects the directors were empowered to take such steps as might be necessary to comply with any statutory enactment, rule, or regulation in any place where the company might carry on business. The company, with a view to carrying on business in California, caused itself to be registered there, and the law of that State imposes on companies trading there certain conditions. One of those conditions is that each stockholder of a corporation is individually and personally liable for such proportion of its debts and liabilities as the amount of stock or shares owned by him bears to the whole of the subscribed capital stock or shares of the corporation, and any creditor of the corporation may institute joint or several actions against any of its stockholders for the proportion of the claim payable by each. There is, further, a provision to this effect: "The liability of each stockholder of a corporation formed under the laws of any other State or Territory of the United States, or of any foreign country, and doing business within this State, shall be the same as the liability of a stockholder of a corporation created under the constitution and laws of this State."

(1) (1865) L. R. 1 Q. B. 115.
(2) (1774) 1 Smith's Leading Cases, 11th ed. at p. 627; 1 Cowp. 161.

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It appears, therefore, that by the law of the State of California a remedy is given to a creditor of a company, not merely against the company with which the contract was made, but against the individual shareholders in proportion to their holdings in the company. That individual liability could not and does not arise by reason merely that the person is a shareholder of the company, and if it is to be held that, by reason of the company of which he is a member entering into contracts and carrying on business in California, his liability as a member of that company is altered, it must be on the ground that he had authorized the company to carry on business there on the terms that he should become liable according to the law of California, and not according to the constitution of the company of which he was a member. I do not express an opinion as to how the case would stand if the defendant were shewn to have in fact assented to the company carrying on business in California on the terms that he should incur personal liability in accordance with the law of that State. If this were shewn, or if facts were proved from which it could be inferred that he had authorized the mode of trading under the particular conditions which imposed a liability on him, the case might be different. It is not necessary to decide that point, because in this case it is sought to infer liability merely from the provisions in the memorandum of association under which the company caused itself to be registered in California and carried on business there. On the facts of this case it cannot be and ought not to be inferred that the defendant authorized the company to pledge his credit in the manner suggested, and unless such an authority is found as a fact or can be properly inferred from the agreed facts no liability can arise. I agree with Kennedy J., who has pointed out in his judgment that, though there are general provisions as to the company carrying on business in foreign countries, there is always the underlying and essential fact of its incorporation as an English company and the fundamental fact that it is a limited company. Primâ facie the provisions of the memorandum of association must be taken to give power to do things not inconsistent with the constitution of the company under the memorandum and articles of association, but it cannot be assumed that because there is liberty

to trade in a foreign country, the company is released from the fundamental condition which limits the liability of its members. To arrive at any other conclusion there must be something more than the fact that the company, which is a limited company, is authorized by its memorandum of association to do certain things. The authority to do these things is given to a limited company, and it can only do them subject to the limited liability of its shareholders, which is a fundamental condition of its existence. Certain authorities have been cited to us, of which certainly the English authorities appear to be entirely consistent with the view that I have expressed. In each of the two cases *Bank of Australasia* v. *Harding* (1) and *Bank of Australasia* v. *Nias* (2) the defendant, who was held liable by foreign law, he himself not being resident on the spot, and not being served with process according to English law, was a member of a company whose constitution provided for the very thing that was done. Being a member of a company so constituted, of course he could not avoid being responsible, and he was held to be made liable in terms to which he had expressly consented. In *Copin* v. *Adamson* (3) an effort was made in the second replication in an action on a foreign judgment to fix the shareholder in a French (4) company with liability, under the law of France, the country where the work of the company had been carried on, without reference to the statutes and articles of association of the company, and this attempt failed, for the Court held that his rights must be ascertained with reference to the contract to which he himself was a party. It was also said that there were decisions in the Courts of the United States which supported the arguments put forward on behalf of the plaintiffs, and the case relied on was *Pinney* v. *Nelson*. (5) When that case is examined it appears to be distinguishable from the present one upon the grounds stated by Kennedy J. in his judgment. By the

(1) 9 C. B. 661.

(2) 16 Q. B. 717.

(3) L. R. 9 Ex. 345.

(4) The name of the company is given in the report as "Société de Commerce de France, Limited," but see Lord Cairns's judgment in C.A., 1 Ex. D. at p. 18; the appeal was on the first replication alone, which did rely on the statutes of the company. —F.P.

(5) 183 U. S. 144.

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constitution of the company in that case there were provisions out of which the Court inferred that there was an express agreement, to which all the shareholders must be taken to be parties, that the business of the company should be conducted in a named and foreign State. The inference of fact was that every person who could be said to be a party to the initiation and incorporation of that company must be taken to have authorized the company to trade in California, that being the special object with which the company was incorporated. That was the inference of fact that was drawn. It is not for us to canvass whether it was rightly drawn or not in that case. In the case before us there is a complete absence of the materials on which the inference was drawn in that case. It seems to me that the case is distinguishable from the present, and in my opinion the decision of the learned judge was right and the appeal must be dismissed.

ROMER L.J. I agree with the judgments of my brother Kennedy and my Lord. The sole question is whether under the circumstances stated in the pleadings the defendant must be taken by implied authority to have contracted with the plaintiffs to be liable individually for a portion of the debt due to them from the Copper King Company, of which he was a shareholder. I need only say that the facts fail to establish any such authority or contract. There are admittedly no facts that could establish such a contract or liability except the fact that the defendant became a shareholder in the limited company that had an intention to trade in foreign parts, and obtained authority to do so under the memorandum of association and traded in California. In my view the memorandum and articles of association, rightly construed, cannot be treated as an authority, by every shareholder of the company, to the company, or its directors or agents, to carry on business in a foreign country so as to make the shareholder liable beyond the limited liability under which he came as a member of the company by virtue of the English law.

If this is the correct view—and it appears to me to be clear that it is—this appeal fails. If there was no authority there

was clearly no contract, and if there is no contract there is no way by virtue of which the defendant could be made liable in this country to the plaintiffs. I need hardly point out that the shareholder and the company are different entities, and that the judgment obtained abroad is a judgment against the company, which prima facie does not affect the shareholder. If the shareholder and the company are treated as different entities the plaintiffs cannot by law enforceable in this country say that the company, trading in California, must, though without authority from the shareholder, nevertheless be held to have contracted so as to make him liable. There is no ground on which liability on the part of the defendant to the plaintiff can be legally based. The decision of the learned judge was right, and the appeal, consequently, fails.

MATHEW L.J. I am of the same opinion. The fundamental rule under which the company, of which the defendant is a member, is carried on in England, is that the personal credit of a shareholder cannot be pledged. It is said that the memorandum of association rescinds that fundamental principle and enables the company to carry on its business abroad, on the terms that the individual shareholder is to be liable as if it were an unlimited company. In order to establish that proposition, it is necessary to shew a contract on the part of the shareholder to make himself liable to that extent. The plaintiffs in this case fail to shew even knowledge on the part of the defendant of the existence in California, where the work of the company was being carried on, of a law having that effect, and they are unable to shew any request or assent by the defendant. That being so, it seems to be clear that the appeal fails.

Appeal dismissed.

Solicitors for plaintiffs: *Balfour, Allan & North.*
Solicitors for defendant: *W. A. Crump & Son.*

A. M.

Dicta of COLLINS, M.R., at p. 70, *applied.* HELMAN *v.* HORSHAM AND WORTHING ASS. COM. [1949] 1 All E.R. 776.

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Nov. 16.

[IN THE COURT OF APPEAL.]

KENT AND ANOTHER, APPELLANTS; FITTALL, RESPONDENT.

Parliament—Franchise—Dwelling-house—Part of House—"Inhabitant Occupier" or "Lodger"—Resident Landlord—Representation of the People Act, 1867 (30 & 31 *Vict. c.* 102), *s.* 3, *sub-s.* 2, *s.* 4—*Parliamentary and Municipal Registration Act*, 1878 (41 & 42 *Vict. c.* 26), *s.* 5—*Representation of the People Act*, 1884 (48 & 49 *Vict. c.* 3), *ss.* 2, 7.

In determining whether a person resident in part of a house is an "inhabitant occupier" under s. 3, sub-s. 2, or a "lodger" under s. 4 of the Representation of the People Act, 1867, the fact that the landlord lives on the premises is not, of itself, conclusive that the person so resident can only be entitled to the franchise in respect of a lodger qualification, and cannot be entitled as possessing a household qualification.

APPEAL from the decision of a Divisional Court upon a case stated by the revising barrister for the parliamentary borough of Devonport.

1. An objection was made to the name of Frank Herbert being retained in the occupiers' list (division 1) for the parish of Devonport as follows:—"That you have not occupied as owner or tenant the premises named in the said list for twelve months immediately preceding July 15 in this year."

2. The facts of the case were as follows:—Frank Herbert occupies as his residence, and has so done for the necessary qualifying period under a verbal hiring agreement from week to week at a rent of 3*s.* 8*d.* per week, one unfurnished tenement room on the third floor of a house, 8, Morice Square, such room constituting a separate dwelling and being used by him for all purposes of living and being separately occupied by him as a dwelling or dwelling-house and he has let to him therewith such use of the passages and staircases as is necessary and convenient to the access to and enjoyment of the said dwelling.

3. Frank Herbert's landlord is one C. J. Weevil, to whom the premises are demised on a yearly tenancy by the owner.

4. C. J. Weevil resides in a separate and independent tenement or set of rooms upon the premises.

5. There are four other occupiers under agreements of hiring

with C. J. Weevil residing upon the premises under exactly similar conditions as Frank Herbert save that their tenements are upon different floors and the number of rooms occupied varies. There is also let to Frank Herbert and the other occupiers the use in common of the court-yard, water-closet, and wash-house situate therein.

6. C. J. Weevil occupies a set of rooms similarly with the other occupiers of the house, and so far as their relationship inter se as residents is concerned C. J. Weevil occupies no different position than he would if he were not the landlord.

7. Frank Herbert has the exclusive occupation, use, and enjoyment of his room or dwelling, and the landlord neither does nor has by agreement or otherwise any right to enter or in any way interfere with or exercise any control or dominion over the room or the joint user of the portion of the premises so used in common as aforesaid, nor has he any personal relationship with Frank Herbert, nor does he nor has he any right to exercise any control or dominion over him in his occupation and user aforesaid.

8. The landlord's use of and right of control over the parts of the premises so used in common as aforesaid is identical with that of his tenants, and he does not reserve to himself or exercise any right of general control or dominion or mastership over the premises. The cleansing of the passages and staircases is shared in common by those using the same, and no service is rendered by the landlord to his tenants.

9. Frank Herbert has a key which enables him at all times to open the front door and obtain access to the house and his dwelling aforesaid, and the landlord reserves to himself no right to otherwise fasten such door.

10. The landlord is obliged by his contract with the owner to keep the premises in repair.

11. The house is rated as a whole in the name of C. J. Weevil, who has duly paid the rates therefor and whose name appears as the rated occupier in the rate-book. Frank Herbert is not raetd, and has never demanded or been required to be rated, in respect of his dwelling aforesaid.

His name appears upon the rate-book for October, 1904, in a

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column which is numbered 24. It does not appear in the rate-book for April, 1905.

12. The names of 2595 others on the occupiers' list (whose names and places of abode as appearing in the list were set out in schedules attached to the case) were objected to under similar circumstances, save that the number of rooms constituting the separate dwelling in each case may vary from one to four, as the case may be, and floors upon which they are situate be different, and save that, as regards the persons objected to in the township of East Stonehouse (where the objections relate only to the parliamentary franchise), their names appear upon the rate-book as occupiers together with the landlord's name, who alone is the person actually rated and paying rates in respect of the particular house, and save that in some cases the resident landlord is himself the owner of the premises and save that the terms of the demises to the resident lessee landlord may vary in length, and save that where two or more rooms are occupied by one person they sometimes do not directly intercommunicate nor are they always on the same floor.

But the above-mentioned distinctive circumstances were admitted by both sides to be and were treated by the revising barrister as being immaterial so far as concerns the principle covering the various cases.

13. It was contended for the appellants that Frank Herbert was not an inhabitant occupier of a dwelling-house as tenant or owner, but a lodger by reason of an alleged control or right of control on the part of the resident landlord and by reason of the tenement not being separately rateable.

The revising barrister held such contention to be wrong, and found that neither in fact nor in law was there on the part of the landlord any general control or right thereto over the house or its occupants, and that the relative position of the occupants to the landlord was the same as if he did not reside upon the premises, and that in fact and in law the tenement dwellings were separately rateable, and he decided that Frank Herbert was an inhabitant occupier of a dwelling-house and entitled to be upon division 1, and allowed his name and that of the 2595 other persons to stand upon such occupiers' list (division 1).

Due notice of appeal from this decision was given in each case, and the revising barrister ordered the appeals in all the cases to be consolidated.

If the Court should be of opinion that the decision was wrong the register was to be amended by expunging the names from the lists.

Upon the argument of the case a Divisional Court (Lord Alverstone C.J., Wills J., and Darling J.) allowed the appeal.

The respondent appealed.

J. A. Foote, K.C. (with him *G. W. Ricketts*), in support of the appeal. The Court cannot review the facts found by the revising barrister, and the Divisional Court must, therefore, be taken to have decided as a matter of law that the residence of the landlord on the premises prevented Frank Herbert from being an inhabitant occupier of a dwelling-house as tenant, and made his status that of a lodger. The rent paid by Frank Herbert was insufficient to entitle him to the franchise as a lodger, and consequently the decision of the Divisional Court disfranchises him. It is not contested that the residence of the landlord is evidence in determining whether his tenants are lodgers or occupiers, but it is not conclusive. Under the Representation of the People Act, 1867, s. 3, one of the qualifications that entitle a man to be registered as a voter in a borough is that, for the requisite time, he has been an inhabitant occupier, as owner or tenant, of any dwelling-house within the borough. The interpretation clause, s. 61, says that "'dwelling-house' shall include any part of a house occupied as a separate dwelling, and separately rated to the relief of the poor," but that definition is replaced by that given by s. 5 of the Parliamentary and Municipal Registration Act, 1878. By that section the term "dwelling-house" is to include any part of a house where that part is separately occupied as a dwelling, and the term "lodgings" is to include any apartments or place of residence, whether furnished or unfurnished, in a dwelling-house. By the same section the separate occupation of part of a house is not to be affected by reason only that the occupier is entitled to the joint use of some other part. It is essential in determining whether a man is an occupier or a

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lodger to consider the way in which he occupies in relation to his landlord. The decision of the Court of Appeal in *Bradley* v. *Baylis* (1), and the two cases that were argued at the same time, shews that the test to be applied is not the residence of the landlord in the house, but the control that he exercises over the portions of the house in which his tenants reside. The landlord, whether he resides in the house or elsewhere, must have some control, and in any case would have a certain control over the parts used in common by himself and his tenants, but to make them lodgers and not occupiers there must be control over the parts occupied by them. Such a control is absolutely negative by the findings in the case. It may well be, as in *Morfee* v. *Novis* (2), that a landlord may retain an authority to control the part of the house in which his tenant lives, but his control over other parts of the house, as for instance the front door and passages, cannot affect the sole and exclusive user of a part in which a tenant resides. The point came before the Court of Appeal in Ireland in *M'Laughlin* v. *Chambers* (3), in which the revising barrister thought that he was compelled by the decisions in *Bradley* v. *Baylis* (1) and *Hogan* v. *Sterrett* (4) to hold that because of the residence of the landlord the tenant was a lodger. The Court held that this view was erroneous, and that there was nothing in those two cases that compelled the revising barrister to find that a tenant, who had sole and exclusive user of part of a house, became a lodger because of the residence of his landlord in another part of the house. There appear to have been two matters that influenced the Divisional Court in deciding as they did; one of them being the instruction given as to filling up Form A of Appendix 2 of the Registration Order, 1895. Paragraph (16.) says: "If the landlord of a house let out in separate tenements lives in the house, he must not return the names of the occupiers of tenements in that house." The effect of that instruction is met by the admission that prima facie the resident landlord would be considered to exercise control over all the house, and it would be for the tenant to claim as occupier, and not for the

(1) (1881) 8 Q. B. D. 195.
(2) (1881) 8 Q. B. D. 200.
(3) [1896] 2 I. R. 497.
(4) (1886) 20 L. R. Ir. 344.

overseers to place him on the list of occupiers. The other matter was the great number of cases consolidated with this one. This was done by agreement between the agents; but the Court is only asked to consider this particular case, the result of which upon the other cases can have no bearing on the decision at which this Court will arrive.

[He also cited *Toms* v. *Luckett* (1) and *Ancketill* v. *Baylis*. (2)]

H. F. Dickens, *K.C.*, and *W. H. Clay*, in support of the judgment of the Divisional Court. The decision in *Bradley* v. *Baylis* (3) and the two cases reported with it turned, not upon the control of the landlord, but upon the question whether he resides or does not reside in the house. The only clear and definite rule that can be applied to determine the question of "occupier" or "lodger" is that if a landlord is found residing in the house with his tenants they are lodgers, and not occupiers. They are, to apply some of the tests that have been suggested, "lodging with" their landlord, that is, residing with the person who has the control of the house. There is a "personal relation" between them and their landlord in the matters of rent and of supervision of the house. In *Bradley* v. *Baylis* (4) Brett L.J. dealt with the case of a house entirely let off to tenants one of whom leaves it, and spoke of the landlord resuming control. In *Ancketill* v. *Baylis* (5) Baggallay L.J. deals with this matter, and points out that the control indicated by Brett L.J. must refer to the case "where the owner resumes full and complete control, as if, for instance, he comes to reside in the vacated rooms." In the same case Sir James Hannen pointed out that it was difficult to define the difference between an occupying tenant and a lodger, but added, "Probably it may be said with accuracy that where the landlord himself resides in the house the other inmates are lodgers, because they submit themselves to his control." Form A, Appendix 2, to the Registration Order, 1895, supports the view that the residence of the landlord on the premises is inconsistent with "occupancy" of the tenants, for it directs that in such a case the names of the tenants are not to be returned as those

(1) (1847) 5 C. B. 23.
(2) (1882) 10 Q. B. D. 577.
(3) 8 Q. B. D. 195.
(4) Ibid. 235, 236.
(5) 10 Q. B. D. 577, at p. 585.

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of "occupiers." In the Irish Court of Appeal, in *Hogan* v. *Sterrett* (1), the view now contended for finds support, for the case, following the previous decisions of this Court, turned upon residence or non-residence of the landlord. It is true that in *M'Laughlin* v. *Chambers* (2) the Court of Appeal in Ireland appear to have taken a different view of this matter, but it is submitted that their decision is opposed to antecedent cases in England and Ireland and should not be followed. In further illustration of the question of residence on the part of the master of the house it may be pointed out that what is called the service franchise turns on the non-residence of the master upon the premises. The revising barrister has found facts in this case which make it identical with the case determined in *Bradley* v. *Baylis* (3), and unless special facts are found which create a difference the rule of law laid down in that case must apply, and the decision of the revising barrister on the question of law was rightly reversed by the Divisional Court.

J. A. Foote, K.C., in reply. The Court of Session in *Bishop* v. *Duffy* (4) took the same view of the result of the decisions of this Court as was taken by the Irish Court of Appeal, and the case adds further support to the view that the real test is the control of the landlord, of which his residence on the premises is evidence but is not conclusive.

COLLINS M.R. This is an appeal from the decision of a Divisional Court upon a case stated by a revising barrister, and the question is whether a particular person is or is not entitled to the franchise as an inhabitant occupier of a dwelling-house.

It is said that a large number of cases depend upon the decision of this one, but it is also said that the facts in the other cases vary in several respects from those in the case before us; and it appears to me that the dependence of those cases upon the result of this one is a matter of mutual agreement by the agents, and not of findings of the revising barrister in those cases. I think, therefore, that we must deal with the point that is raised upon the footing that we have to decide the

(1) 20 L. R. Ir. 344.
(2) [1896] 2 I. R. 497.
(3) 8 Q. B. D. 195.
(4) (1894) 22 R. 192.

particular case in respect of which special facts have been stated.

In the discussion as to the meaning of the word "lodger" as distinguished from the word "occupier" we are likely to lose sight of the foundation of the whole matter, that is, the conditions upon which the Legislature has given the franchise to certain persons as inhabitant occupiers of dwelling-houses.

By the Parliamentary and Municipal Registration Act, 1878, s. 5, it is enacted that "In and for the purposes of the Representation of the People Act, 1867, the term 'dwelling-house' shall include any part of a house where that part is separately occupied as a dwelling; and the term 'lodgings' shall include any apartments or place of residence, whether furnished or unfurnished, in a dwelling-house." By the same section: "For the purposes of any of the Acts referred to in this section, where an occupier is entitled to the sole and exclusive use of any part of a house, that part shall not be deemed to be occupied otherwise than separately by reason only that the occupier is entitled to the joint use of some other part." Therefore, we have to see, when dealing with a person who does not occupy the whole of a dwelling-house, whether he comes within the conditions of the statute in his occupation of part of the house so as to be entitled, other conditions being fulfilled, to claim the franchise under s. 3 of the Representation of the People Act, 1867. Under that Act the occupation must be at the least that of a tenant, and the question of the terms on which, as between himself and his landlord, he occupies is, in the first instance, a question of fact, and when those terms are ascertained it is an inference of law whether he is occupier as tenant or is a lodger. In view of that question we have to consider the position of the landlord, who is the common factor in both cases, and the relation between him and his tenant or lodger. To entitle a person to the franchise in respect of the occupation of part of a house he must shew that he occupies it separately. If another person is really in control of that part of the house, the person living in it has not a separate occupation within the meaning of the Act of 1878; his occupation is on behalf of his landlord, and he is a lodger. On the other hand, if by agreement with his landlord he has

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an independent occupation which the landlord cannot control, his occupation is that of a tenant, and entitles him to the franchise as an inhabitant occupier, provided he fulfils the other necessary conditions.

I come now to the findings of fact in this case. The learned revising barrister has found, as it seems to me, that the person as to whom the case is stated occupies a separate dwelling in an absolutely independent manner, and free from the control of his landlord. So far as these findings are questions of fact we are bound by them, and unless on the facts a necessary presumption of law arises, to which we must give effect, his conclusion is final. The facts as found are that the man pays a rent of 3*s.* 8*d.* per week for one unfurnished tenement room on the third floor of the house, "such room constituting a separate dwelling and being used by him for all purposes of living and being separately occupied by him as a dwelling or dwelling-house, and he has let to him therewith such use of the passages and staircases as is necessary and convenient to the access to and enjoyment of the said dwelling." So far the subject-matter of occupation is brought within the definition contained in the section. It is further stated that the landlord who is the tenant of the whole house resides in a separate and independent tenement or set of rooms upon the premises, that he occupies them similarly to the occupation of the others in the house, and that, so far as their relationship inter se as residents is concerned, the landlord occupies no different position from that which he would occupy if he were not the landlord. It is found also, in the broadest terms, that the man had the exclusive enjoyment of his room, and that the landlord had not, by agreement or otherwise, any right to interfere with or exercise control over the room, or the user of it, and further that the landlord did not reserve or exercise any general control over the premises, or render any service to his tenants.

It was admitted by the Court below that they were bound by the statements on the case so far as they are statements of fact. We also are bound, and if the judgment appealed against contradicts the statements of fact it went beyond the jurisdiction of the Court. It seems to me that it was only by treating the

statements, not as findings of facts, but as inferences of law, that the decision of the Court below was arrived at. There is no conflict as to the law between the view taken in the Court below and that which I hold, but it seems to me that the revising barrister was the judge of the facts and that the decision of the case must turn upon the facts as found by him. If we had before us all the evidence upon which the barrister has arrived at his conclusion as to the control of the landlord, the matter might have been different. It might have been possible to say that the conclusion could only have been arrived at by misdirection on a matter of law, but on the case before us there is nothing to shew this. We must start with the fact that the landlord retains no control over that part of his house for the occupation of which the tenant claims the franchise, and any control by the landlord over that which is not part of the qualifying subject-matter appears to me to be immaterial. It has been pressed upon us in argument that a person who resides in part of a house cannot claim as an inhabitant occupier if his landlord lives in the same house, because the residence of the landlord is incompatible with the claim. It seems to me on principle that it cannot be affirmed as a matter of law that the co-existence of the landlord as an occupier of another and a distinct subject-matter is a bar to the claim of the tenant to a separate tenancy, any more than if the landlord lived next door or in the next street. The law has created a thing which is capable of being the subject-matter of a separate tenancy, and the only bar to a claim in respect of it is that it has not been occupied in such a way as to shew that the occupation has been free and uncontrolled. The occupation may be subject to stipulations, such for instance as would give the landlord a right to enter the tenement for the purposes of repair; but that is compatible with an independent occupation, such as would give the franchise to the tenant, and that is the occupation that the revising barrister has found to exist in this case.

That being, in my view, the broad principle upon which this case depends, we have been pressed with authorities, notably the case of *Bradley* v. *Baylis* (1), and an argument has been founded on observations in that case which invites us to hold that as a

(1) 8 Q. B. D. 195.

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matter of law the dwelling-house franchise cannot exist where the landlord dwells in the same house. It appears to me that a critical examination of what was said by the learned judges in that case negatives this contention. Each of them in every reference to the residence of the landlord couples with that reference some statement indicating control by the landlord, and it seems to me that the question treated as vital by all the judges is that of control. It is not disputed that in dealing with the occupation of part of a dwelling-house, if the landlord is living in the house, that fact creates a presumption that the occupation of the other part is that of a lodger rather than that of an inhabitant occupier. But while that is the inference that may be drawn, it is not a necessary inference of law, and there is no authority that it is to be treated as conclusive. I regard the judgment of Cotton L.J. in *Bradley* v. *Baylis* (1), which does not differ from the judgments that preceded it, as to some extent summing up the substance of the earlier dicta on the matter. In the course of his judgment (2) he said, in answer to the question What is a lodger?: "In my opinion, it is not necessary that the person with whom he lodges, that is, his immediate landlord, should live in the house to make him a lodger. Nor is it necessary that the immediate landlord should have the exclusive control over the key of the outer door; but, in my opinion, some control over the house must be exercised by the person in whose house a man lives to make him a lodger": shewing clearly, as it seems to me, that the substance of the matter is control. That case has been considered in the Court of Appeal in Ireland in *M'Laughlin* v. *Chambers* (3), and the judgment of the Chief Baron deals specifically with this point. After analyzing the dicta in *Bradley* v. *Baylis* (1), the learned judge sums up the matter by putting control, and not residence, as the really significant thing in determining the question of the landlord's position in relation to premises which are claimed as giving the household qualification. In dealing with the earlier case of *Charlton* v. *M'Manus* (4), in which the same point was raised, he says, at p. 509 of the report: "In that case the

(1) 8 Q. B. D. 195.
(2) Ibid. 241.
(3) [1896] 2 I. R. 497.
(4) (1894) 29 I. L. T. R. 16.

landlord came into possession of part of a structure by reason of the tenant of a separate room therein quitting possession and giving the same over to the landlord who came to live there, and we held that the mere residence of the landlord in the same structure did not of itself disqualify the tenant of another room, occupied as a separate dwelling-house, who had been, previous to the arrival of the landlord on the premises, admittedly entitled to be registered as an inhabitant householder. In that case I endeavoured to shew that *Bradley* v. *Baylis* (1) did not establish that the presence of the landlord in a house set out in tenements does not of itself determine the question whether a person is a lodger or an inhabitant householder. I want now to go a little further, and to point out what is the determining factor. The real question involved is this—Is there but one dwelling-house, or is the structure one in which there are two or more separate dwelling-houses?" The learned judge then quoted the passage that I have read from the judgment of Cotton L.J. in *Bradley* v. *Baylis* (1), and continued: "In my opinion the rule laid down in *Bradley* v. *Baylis* (1) is this: Where a claimant dwells in rooms forming part of a structure, in any other part of which structure the landlord dwells, and over which structure the landlord exercises a control as master—a paramount governing control, which is to be attributed to his position as master, and which is something different from that of a man who merely occupies rooms in the same structure—then every one of the tenants in the structure or house is a lodger." It is said that this decision is in conflict with the earlier decision of the same Court in *Hogan* v. *Sterrett* (2), but in dealing with that case and *Bradley* v. *Baylis* (1) the learned Chief Baron said (3): "Neither of these cases decides that the mere fact of the residence of the landlord in the structure in which his tenants reside is enough per se as matter of law to disqualify the tenants." There is thus no difference in the view taken in this case of *M'Laughlin* v. *Chambers* (4) and the earlier case in the same Court. I think it is worth while to refer to the judgment of Porter M.R. in

(1) 8 Q. B. D. 195.
(2) 20 L. R. Ir. 344.
(3) [1896] 2 I. R. 497 at p. 508.
(4) Ibid. 497.

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Hogan v. *Sterrett* (1), for the decision has been relied on as an authority that the presence of the landlord in the house negatives the acquisition by the tenant of the dwelling-house franchise. The learned Master of the Rolls says this: "I do not mean to decide that in every case where the landlord resides under the same roof the persons occupying the other portions of the structure may not be entitled otherwise than as lodgers. I think they may be entitled; but the evidence of separate occupation must be very clear—such as in the case of 'flats': for there the landlord would live in a separate 'house' within the meaning of the Act, and there would be several 'dwelling-houses' all under the same roof. When that case arises it will have to be considered on its own merits." That is really the case that has arisen here, because if a tenement is once brought within the definition of a dwelling-house in the Act, as a part of a dwelling-house, it is in the same position as a flat. I cannot see any difference in point of law between a tenement which is part of a dwelling-house, and is made by statute a separate dwelling-house, and a flat which is also part of a dwelling-house. There is a difference only in the physical structure of the principal dwelling-house in the two cases.

The case of *Ancketill* v. *Baylis* (2) was also relied on in argument, and I will read a passage from the judgment of Sir James Hannen. At p. 586 of the report he says: "It is difficult to define the difference between a tenant and a lodger; but probably it may be said with accuracy that where the landlord himself resides in the house the other inmates are lodgers because they submit themselves to his control; but where the landlord does not reside in the house, or where he occupies a separate set of rooms in the basement," which I think is analogous to the case before us, "or where the house is divided into separate and independent dwellings or into separate flats with a porter," "dwelling" there, I take it, means something distinguishable from a flat—a separate dwelling within the Act—"or, as happens abroad, with a concierge living upon the premises, in each of these cases, even although a servant of the landlord may be present, the separate occupation exists which is necessary to

(1) 20 L. R. Ir. at p. 349. (2) 10 Q. B. D. 577.

constitute a tenancy." That seems to me a dictum exactly in point, and it is a dictum in the Court of Appeal in this country. There is therefore no foundation for the suggestion that there is a difference of opinion between the English and the Irish Courts of Appeal.

On the whole it seems to me that the weight of authority in both countries is clearly in favour of the view that the fact that the landlord lives on the premises, under the conditions described in the case before us, does not exclude from the franchise, as an inhabitant occupier of a dwelling-house, a resident in a part of the premises who, in other respects, complies with the conditions imposed by the Act.

In my judgment the appeal must be allowed.

ROMER L.J. The subject of this appeal is a striking example of the difficulty that may arise in determining whether a man who resides in a rateable hereditament is an occupying tenant of a dwelling-house or is occupying the tenement as a lodger. It appears to me to be impossible to lay down by a hard and fast rule or a proposition of law, or to define exhaustively what constitutes the difference between an occupying tenant and a lodger, so as to solve the difficulty. Jessel M.R. in *Bradley* v. *Baylis* (1), said: "I have been quite unable, so far as I am concerned, to frame an exhaustive definition. Some judges have tried to do so, and, in my opinion, they have failed; and I think it wiser and safer to say that the question whether a man is a lodger, or whether he is an occupying tenant, must depend on the circumstances of each case." I respectfully agree with that statement, and I will proceed to apply it to the case before us, and to consider what are the circumstances of this case.

The facts with which we have to deal depend upon the findings of the revising barrister, and I may say at once that, in my opinion, his findings, to which I shall briefly refer, are matters that it is not right or competent for us to disregard. I cannot agree that they can be treated as matters of opinion on points of law which

(1) 8 Q. B. D. 195, at p. 219.

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we are at liberty to disregard or overrule, and it is because we are treating them as findings of fact that a difference of opinion has arisen between the Divisional Court and this Court.

Turning to the case, I find that in paragraph 2 the revising barrister states that the person whose position is in question in this case is occupying a room, constituting a separate dwelling-house, used by him for all purposes of living, and separately occupied by him as a dwelling-house, and that he has also had let to him the use of certain passages and staircases. Let me at once get rid of any question as to the passages and staircases, because, having regard to the provisions of s. 5 of the Parliamentary and Municipal Registration Act, 1878, the joint use of that part of the house may be disregarded.

In paragraph 7 it is stated that this inmate has the "exclusive occupation, use and enjoyment of his room or dwelling, and the landlord neither does, nor has by agreement or otherwise, any right to enter or in any way interfere with or exercise any control or dominion over the room": and further, in paragraph 8, it is stated that the landlord "does not reserve to himself or exercise any right of general control or dominion or mastership over the premises"; and in paragraph 9, that the tenant has a key which enables him at all times to open the front door and to obtain access to the house and to his dwelling, and that the landlord reserves no right to fasten the door.

On those facts one thing is clear—that, within the definition of the Acts which we have to take into consideration, the room occupied by this inmate of the house is a dwelling-house, and I think there can be no doubt that within the meaning of s. 3, sub-s. 2, of the Representation of the People Act, 1867, the man is an inhabitant occupier, and I should, so far, have certainly been of opinion that he was also a tenant within the meaning of that expression as it occurs in that section. There would therefore be a prima facie case that he was entitled to the franchise as an inhabitant occupier of a dwelling-house.

The facts which are found in the case, that the landlord pays the rates, and does the repairs of the house as a whole, would clearly not in themselves alter the position of affairs. It cannot be disputed that, in this case, if the landlord did not reside in

part of the house the inmate would clearly not be a lodger, but would be an occupying tenant.

In the case of *Bradley* v. *Baylis* (1), to which I have already referred, Sir George Jessel says, at p. 220 of the report: "On the other hand, suppose a landlord does not demise the whole of the house, but everything in it that can be demised, except the staircases and passages, &c., as to which he gives the inmates the right of ingress and egress, but exercises no control over, and does not reside in the house—I think the inmates are occupying tenants. Here, again, does the fact of the landlord repairing or paying rates and taxes make any difference? I think not. Of course, he has a right to enter to make such repairs, but still, in my opinion, that does not prevent the occupier being in rateable occupation." And, indeed, to hold otherwise would be to impugn those cases, which, I think, are now settled, with regard to the occupancy of flats: where the owner of a large house containing a block of flats takes upon himself, when he lets them, the obligation to pay the rates and taxes, and to do the repairs as between himself and the tenants of the flats. In that position of affairs if this inmate was an occupying tenant under the Act, does, as a matter of law, the occupancy by the landlord of part of the house, of necessity and by itself, turn what would otherwise be an occupying tenancy into a case of a lodger holding? I think not, and I agree with the decision arrived at by the Irish Court of Appeal in *M'Laughlin* v. *Chambers* (2) and with the reasons given by the judges for the conclusion to which the Court came.

To my mind, to hold otherwise would lead to strange consequences. Take the case of the owner of two houses who lives in one, and lets out the other to different tenants in separate parts, so as to make them clearly and beyond question occupying tenants. Suppose also that one of those tenants goes out, and creates a vacancy as to part of the house, and the landlord, after six months' occupancy by the rest of the tenants during the qualifying period, chooses to move into the vacant premises, would that fact, without any change of control, or any other change of circumstance, suffice, as a matter of law, to change

(1) 8 Q. B. D. 195. (2) [1896] 2 I. R. 497.

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the remaining tenants' holdings into occupancy as lodgers? In my opinion we are not compelled as a matter of law to arrive at a conclusion which would give rise to such an anomalous state of things.

In my opinion the essential point to consider in cases like the present is the right of control on the part of the landlord. It has been frequently pointed out that, to make an inmate a lodger where he has an exclusive right to the use and occupation of part of a house, there must be some right of control by the landlord. Take, for example, the case of *Toms* v. *Luckett* (1), in which case Maule J. said: "Where the owner of a house takes in a person to reside in a part of it, though such person has the exclusive possession of the rooms appropriated to him, and the uncontrolled right of ingress and egress, yet, if the owner retains his character of master of the house, the individual so occupying a part of it, occupies it as a lodger only, and not as a tenant. . . . The question depends upon whether or not the owner of the house resides upon the premises, retaining his quality of master, and reserving to himself the general control and dominion over the whole." Other judges are, to my mind, referring to the same thing when they say that in considering what is a lodger you must see that the person who is to be a lodger to another not only lodges in the same house, but lodges with that other, or that in order to establish the position of lodger there must be a personal relation between him and the landlord. This essential right of control was referred to, and the importance of it was pointed out by Sir George Jessel M.R. in his judgment in *Bradley* v. *Baylis* (2), in the following passage:—"It seems to me, as to unfurnished lodgings (and I will only deal with unfurnished lodgings, as it is the only class of cases with reference to which questions are likely to arise) where the owner of the house does not let the whole of it, but retains a part for his own residence, and resides there, and where he does not let out the passages, staircase and outer door, but gives to the "inmates" (I use that term for my present purpose) merely a right of ingress and egress, and retains to himself the general control, with the right of interfering—I do not mean an

(1) 5 C. B. 23, at p. 38. (2) 8 Q. B. D. 195, at p. 219.

actual interference, but a right to interfere, a right to turn out trespassers, and so on; there I consider that such owner is the occupying tenant of the house, and the inmate, whether he has or has not the exclusive use of the room, is a lodger."

I only desire to add a few words about the case of *Morfee* v. *Noris* (1), which in my opinion is clearly distinguishable. It appears by the statement in p. 200 of the report that there was, if not a finding, a clear intimation of opinion by the revising barrister that there was a right of control by the landlord over the part of the house occupied by the inmate, and, indeed, such an occupation as would give the landlord the right to sue for trespass to that part. There was further, as pointed out by Brett L.J. in the course of the argument, no finding that the inmate had the exclusive occupation of his rooms, but only that he had the exclusive use; and, lastly, Cotton L.J., at p. 242, points out that the immediate landlord exercised a control over the whole house.

In the present case it appears to me on principle, on the facts stated, that this inmate was in the position of a tenant, and not in that of a lodger, and I agree that the appeal must be allowed.

MATHEW L.J. I am of the same opinion. The object of the Acts of 1867 and 1878 was to give to the occupant of part of a dwelling-house the franchise which was previously confined to the occupant of an entire dwelling-house. What then is the kind of occupation applicable to a case like the present of a person resident in one room in a dwelling-house? Clearly it is an exclusive occupation analogous to the occupation of an entire dwelling-house, and where the other conditions are fulfilled it seems clear that in such a case the franchise should follow.

In the case before us the findings of fact shew in the clearest way that there was exclusive occupation in the fullest sense of the term without any interference on the part of the landlord. Why is not effect to be given to these findings? It is said that we ought not to act on them because the revising barrister disregarded an imperative rule of law, to the effect that there

(1) 8 Q. B. D. 200.

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cannot be exclusive occupation of a room in a house if the landlord lives in another room, or rooms, of the house. In my opinion that is incorrect, and extraordinary results would arise if the residence of the landlord in the house were the conclusive criterion of whether the other inmates had separate occupation of other parts of the house. If the whole of a house were let in separate tenements, and one room became vacant, and the landlord took up his residence in that room, the rest of the inmates would no longer have the position of inhabitant occupiers and would lose the franchise, although there had been no alteration in their agreements of tenancy. Such an extraordinary result seems to me to forbid the adoption of the suggestion that the residence of the landlord on the premises necessarily indicates that he has a general control over the rooms of his tenants, and I agree with the other members of the Court that the authorities are opposed to such a view, and that the appeal should be allowed.

Appeal allowed.

Solicitors for the appellants: *Ayrton, Briscoe & Barclay.*

Solicitors for the respondent: *Cunliffes & Davenport, for R. J. Fittall, Devonport.*

A. M.

CARRINGTONS, LIMITED *v.* SMITH.

1905
Nov. 18;
Dec. 2.

Moneylender—Loan Transaction—Excessive Interest—Risk—"All the Circumstances"—Moneylenders Act, 1900 (63 & 64 *Vict. c.* 51), *s.* 1, *sub-s.* 1.

The defendant, a director of a company with an income of 1000*l.* a year and possessed of furniture and pictures of considerable value, being in want of 150*l.* in order to pay sundry creditors, but not being in great necessity, as his creditors, though pressing for payment, were not threatening proceedings, obtained a loan of 150*l.* from the plaintiffs, who were moneylenders, and gave them two promissory notes, one for 150*l.* and one for 72*l.*, repayable respectively by twelve and six equal monthly instalments. The notes each contained a default clause, the nature and effect of which the defendant clearly understood, providing that on default of payment of any instalment the whole of the amount of the note then remaining unpaid should become due and payable. The interest on the loan worked out at 75 per cent. per annum. The plaintiffs obtained no security for the loan, but at the time were informed by the defendant as to his financial position. The defendant paid off all the instalments of the 72*l.* note, and, after paying seven instalments of the 150*l.* note, made default, and on being sued for 62*l.* 10*s.*, the balance, claimed relief under the Moneylenders Act, 1900:—

Held, that although the rate of interest was high, that fact did not of itself necessarily render the transaction "harsh and unconscionable," and that, having regard to the risk and to all the circumstances of the case, amongst which the Court was entitled to consider the fact that the defendant understood the transaction, and without any misrepresentation or pressure by the plaintiffs voluntarily agreed to pay the interest asked, 75 per cent. per annum was a reasonable rate of interest, and not "excessive" within the meaning of the Act, and the transaction was not "harsh and unconscionable," and that the defendant was therefore not entitled to relief.

Action tried by Channell J. without a jury.

The plaintiffs were moneylenders, and the action was brought to recover 62*l.* 10*s.*, being the balance due under a promissory note for 150*l.*, dated December 31, 1904, made by the defendant and payable by monthly instalments of 12*l.* 10*s.*, and on default of payment of any one instalment when due the whole amount then remaining unpaid to become due and payable forthwith. The defendant paid seven instalments amounting to 87*l.* 10*s.*, and then made default. The defendant claimed relief under the Moneylenders Act, 1900, s. 1, sub-s. 1.

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The facts as stated by the learned judge in his judgment were as follows: "The defendant T. Johnson Smith is a director of a publishing company. He has as such director an income which he estimates at 1000*l.* per annum, derived, however, partly, at any rate, from commissions. He lives at Beckenham, and he estimates that the furniture in his house there, which, with the exception of a grand piano, is his own, is worth 3000*l.*, and he has pictures which he estimates to be worth 6000*l.* He was called as a witness, and he appeared to be a quite reliable one. I accept his statements, except his opinion as to the exact value of his pictures and furniture, which he probably over-estimates, as most owners of such property do. In December, 1904, he owed about 150*l.*, his creditors were said to be pressing for payment, but had not taken any steps to enforce it, and no execution was imminent or anything of that kind. Having no ready money to pay, and having seen an advertisement or received a circular from the plaintiffs, who are registered as moneylenders, he called at their office. The circular or advertisement which took him to the plaintiffs was not put in, and no complaint was made of its terms. He saw a manager and told him that he wanted a loan of 150*l.*, and stated the facts as to his position, which I have mentioned above. The manager arranged to call at his house at Beckenham in order to judge of the correctness of those statements, and accordingly came on Saturday afternoon, December 31. He was shewn into the dining-room and into the drawing-room, and said that he was satisfied. The defendant says that pictures worth about 3000*l.* were in these two rooms. The plaintiffs' manager then said that he had 100*l.* with him, which he could lend the defendant then, that he had no more with him, but would lend another 50*l.* if the defendant would call at their office in the next week. A conversation then took place as to the terms. The defendant had previously refused to give a bill of sale, and no other security was suggested. The manager said that he should expect 50*l.* for the loan of 100*l.*, taking a promissory note for 150*l.*, payable by twelve monthly instalments of 12*l.* 10*s.* each. The form of the note was produced, and it contained a clause that on default in payment of any instalment the whole was to become due. The defendant

made no objection to the terms, or to the default clause, but asked whether if he was able to pay off the whole before the time a reduction would be made, and he was told that in that event a substantial reduction should be made. The defendant signed the note now sued on, and a few days afterwards went to the plaintiffs' office, got the other 50*l.*, and signed another similar promissory note for the repayment of 72*l.* by six monthly instalments. On the occasion of his signing the second promissory note he made a statutory declaration as to his property, and when he signed the first note he had given a receipt for the 100*l.*, in which he made similar statements. The defendant quite clearly understood all this. He is intelligent and a man of business, not one of those company directors who are sometimes seen in Courts of justice, and who appear to have been selected for the office not because of their knowledge of business, but because of their want of it. He was not in any great necessity; he merely wanted to pay off the few creditors he had to the amount of 150*l.*, and believed, and, as the event I think proved, was right in believing, that he could pay the monthly instalments, and he no doubt preferred to pay the 50*l.* asked by the plaintiffs for the accommodation rather than disclose his temporary embarrassment to any friends who knew him by trying to borrow from them or through them on better terms. He paid the monthly instalments until the month of August, not exactly on the due dates, but never more than a day or two late, and he thus had paid off the whole of the 72*l.* note, and had paid seven out of the twelve instalments on the 150*l.* note. He did not, however, pay the instalment due on September 1, and on September 7 he wrote excusing his non-payment on the ground of the holidays, and added: 'As I have already paid more than the amount of the loans I shall be glad to know the net amount you would accept to settle the balance.' The plaintiffs, or rather the liquidator of the plaintiffs' company which appears then to have gone into liquidation, wrote back asking for the cheque to be sent as soon as possible, and stated that they 'were unable to make any reduction.' The defendant took no notice of this letter, but upon getting another letter again asking for the cheque for the 12*l.* 10*s.* he

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consulted a solicitor, who wrote on September 18 the following letter :—

"'September 18, 1905.

"'Dear Sir,—My client, Mr. T. Johnson Smith, has seen me in reference to your letter to him of the 8th inst., and has instructed me to offer you a sum of 10*l.* 10*s.* in full satisfaction of your claim against him for principal interest and costs.

"'This, added to the 159*l.* 10*s.* he has repaid you, works out at more than 30 per cent. interest per annum for the period he has had the money.

"'Having regard to the value of the security which you hold the interest you are charging is excessive.

"'I shall be pleased to hear from you.

"'The Liquidator, C. and C. Carringtons (Ltd.),
9, Old Cavendish-street, W.'

There was, of course, no security, and the solicitor seems to have been misinstructed, or to have made a mistake about this, and it will be observed that the offer only gave the moneylender 20*l.* for his loan of 150*l.* cash, and that by reopening the transaction on the note which had been paid in full without demur, on the advance in respect of which the plaintiffs are now suing, they were to have no interest at all. This letter led to further correspondence, which, however, was without prejudice, and shortly afterwards the writ in this action was issued."

Wallace Atkins, for the plaintiffs.

T. B. Napier, for the defendant.

[The arguments of counsel and the cases cited sufficiently appear from the judgment.]

Cur. adv. vult.

Dec. 2. CHANNELL J. read the following judgment:—This action was brought to recover a balance of 62*l.* 10*s.* due on a promissory note. The note was admitted, and the defendant claimed relief under the Moneylenders Act. The facts are as follows: [The learned judge stated the facts as set out above, and continued:—] These facts appear to be consistent with the defendant's having agreed to the plaintiffs' terms without ever intending

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to comply with them, but intending all along to set up, as he is now doing, the Moneylenders Act, and to try and get off on paying some small rate of interest, knowing very well that the plaintiffs never would have made him the advance on such terms. Such conduct, however, would in my opinion be grossly dishonest, and the defendant being apparently quite a respectable man, I hesitate to come to the conclusion that his conduct is to be accounted for in that way, and prefer to assume that he had intended to pay, but that some time about September he changed his mind on what appears to me to be bad advice. It is, I think, necessary to consider very carefully whether the Moneylenders Act applies to such a case as this. There seems to me to be from first to last no misrepresentation by the moneylenders, and no taking advantage of the ignorance or of the necessity of the borrower. There is nothing but the taking of 50*l.* for a loan of 100*l.*, repayable by instalments over twelve months. The rate of interest calculated at a rate per annum on the amount of principal remaining due from time to time works out, I believe, at about 75 per cent. per annum. I do not know whether the defendant by his letter of September 7 meant to call on the plaintiffs to fulfil their promise to make a reduction if he was able to pay before the money was due, but he does not remind them of it, and it will be observed that he was then in arrear. I cannot think that there is anything to complain of in the formal reply asking him to pay up his arrears, and except the solicitor's letter, which hardly assists the defendant's case, all the remaining correspondence is without prejudice. We are therefore unable to say what offers may subsequently have been made, nor can any subsequent refusal of the moneylender to make a reduction for present payment bring the case within the Act if it was not so before. It is said that the Moneylenders Act applies because there was no risk. On the facts, as I have found them, of course the plaintiffs did not really run any substantial risk of losing their money, because the defendant has ample goods on which to levy when judgment is obtained against him; but it by no means follows that the plaintiffs knew or ought to have known how safe the matter really was. They had no security, and were accepting the defendant's personal

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promise to repay and his own assertions of his ability to do so, uncorroborated otherwise than by his being in apparent possession of a good house of furniture and pictures; and any money-lender must know that there are always risks of the statements of borrowers proving incorrect. Under these circumstances I should suppose a high rate of interest would certainly be suggested, and the borrower's willingness to pay that high rate would tend to make the lender think the risk likely to prove greater than he had thought rather than less. So far as the risk is material, it seems to me that it is not what was the real risk as ascertained after the event which has to be looked at, but how the matter would present itself to the lender at the time with the experience he certainly would have of borrowers. I do not, however, think that the risk is the only matter to be considered. The words of the Act, leaving out those which are immaterial, are "where proceedings are taken, and there is evidence which satisfies the Court that the interest charged in respect of the sum actually lent is excessive, or that the amounts charged for expenses, &c., are excessive, and that in either case the transaction is harsh and unconscionable or is otherwise such that a Court of Equity would give relief, the Court may reopen the transaction, &c." Now it is not, of course, permissible to construe the words of the Act by any knowledge we may have of the circumstances under which the Bill was brought in, or of the intentions of those who promoted it, or as to what was introduced into the Bill by way of amendment. I think, however, that the words of the Act do of themselves shew quite clearly that an effort has been made (possibly without much success) to define the transactions which the Court may reopen. There seem to me to be clear indications that it was not intended to give jurisdiction to a judge to reopen transactions merely if in his individual opinion too much interest had been charged. Further, I think any Court ought to lean against any such construction of an Act of Parliament. The function of a judge in this country, and I should think in all civilized countries, is to ascertain and declare the rules of law (or of equity when there is a distinct system of equity as distinguished from law), and to decide the rights of the parties before him according to those rules, and not

according to his own idea of abstract right or justice. When, before the Judicature Act, a bill was dismissed for want of equity, what was meant was that the suitor had not brought the case within the rules according to which the Court of Equity gave relief, and not that there was no abstract equity or justice in his case. It would, in my opinion, be mischievous in the extreme if the Legislature were, even in a limited class of cases, such as those between moneylenders and borrowers, to give the judges jurisdiction to decide cases without some definite rule to go by, and I do not think they have done it, although in the Act now under consideration there is considerable difficulty to find the rule.

No great while after the Act passed Ridley J. in *Wilton* v. *Osborn* (1), in a judgment in which he reviewed the equity cases, held that "harsh and unconscionable or otherwise such that a Court of Equity would give relief" meant so harsh and unconscionable as that a Court of Equity would give relief, or in some other way besides that recognized way such that a Court of Equity would give relief. I also held the same, but I think that my opinion may have been unduly influenced by the personal knowledge I had as to how the words in question got into the Act of Parliament. The Court of Appeal, however, in *In re A Debtor* (2) held that this view was wrong, and that a transaction may be "harsh and unconscionable" within the meaning of the Moneylenders Act, though not so harsh and unconscionable as that a Court of Equity could have given relief before the Act. That decision is, of course, binding on me, and the rule laid down by Ridley J. is therefore gone, and we must look somewhere else for the rule as to what transactions may be reopened. The difficulty is that the words remaining are so vague. Harsh and unconscionable are not easy words to construe when the rules of the Court of Equity have been put out of consideration, but they are at any rate used to describe some conduct of the moneylender, and it may be easy enough in many cases to say whether or not his conduct can be fairly described by those epithets. There is a much greater difficulty as it seems to me in the word "excessive." It is a relative word—exceeding what?

(1) [1901] 2 K. B. 110. (2) [1903] 1 K. B. 705.

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Interest is nothing but the sum to be paid for the use of money for a certain time, and the value of a loan of money, as of everything else, is what it will fetch. The usury laws have been done away with, and the Legislature seems to have intentionally avoided re-enacting them and telling us what is to be the maximum of lawful interest. There are, however, some words further on in the section which I think are a guide to the meaning of the Legislature in the use of the word "excessive." If the transaction is reopened the Court may "relieve the person sued from payment of any sum in excess of the sum adjudged by the Court to be fairly due in respect of such interest as the Court, having regard to the risk and all the circumstances, may adjudge to be reasonable." It seems, therefore, that the Court is to make an adjudication as to what interest, "having regard to the risk and all the circumstances," is reasonable; and then if the interest charged is in excess of that amount it seems that it is excessive within the meaning of that word as used earlier in the section. This task would often be a difficult one, but amongst "all the circumstances" which the Court is to take into consideration, surely, the fact that the borrower has thoroughly understood the transaction and, knowing all the facts much better than the Court can possibly do, has been quite willing to pay the interest asked is one of the circumstances which the Court must consider. Often the Court will not have that circumstance to guide them. The borrower is frequently ignorant, sometimes imposed upon; frequently in such straits that he has no alternative, but must take the money on the only terms he can get it. In those cases the man's agreement to pay the interest asked can be of no real guide to the Court. But in the case before me there is nothing, unless the Act of Parliament forbids it, to prevent my saying that the defendant knew much better than I do what it was reasonable for him to pay for the accommodation he wanted. I see nothing unreasonable in a man who has an income of 1000*l.* a year, and who may know that he can if he likes live on 750*l.*, preferring to pay 72*l.* to a moneylender for the money which is to relieve him from a temporary embarrassment rather than tell his banker or his solicitor, or any friend, that he is in temporary embarrassment. A man cannot borrow otherwise

than from a moneylender except from or with the assistance of people who know him. I do not, of course, know the exact nature of the debts which this defendant desired to pay off. He was not asked, and did not tell me. Even if the debts were only incurred by household expenses beyond his income, or by buying to an extent beyond his income pictures or bronzes, which he seems to collect, he might not desire to disclose that extravagance to his friends; but, of course, if it happened that the liabilities were incurred in some other way—such, for instance, as in any form of gambling, of which he might be heartily ashamed—he would be even less likely to wish to disclose it, and be more willing to pay high interest to a moneylender. Why should I say that he was unreasonable in what he did, when he, an intelligent man, must know his affairs better than I do?

I now proceed to deal with the cases on this Act. In *In re A Debtor* (1) the actual decision, as I have already pointed out, was merely that "harsh and unconscionable" was not limited to such cases as a Court of Equity before the Act would have held to be harsh and unconscionable. The Master of the Rolls, however, and Cozens-Hardy L.J. each say that under this section the interest charged might be so excessive as of itself to render the bargain harsh and unconscionable. This is repeated and emphasized by Cozens-Hardy L.J. in *Wells* v. *Allott* (2), a case in which the actual decision merely was that the fact of interest being high, and therefore prima facie excessive, was sufficient ground for giving a defendant leave to defend under Order XIV. I hardly think the head-note of the last-mentioned case in the Law Reports is correct, as I do not find in the report that the Lords Justices committed themselves to the view that the question at the trial would be as stated in that head-note, "whether the interest was so excessive as to render the transaction harsh and unconscionable." It may

(1) [1903] 1 K. B. 705.

(2) [1904] 2 K. B. 842. Cozens-Hardy L.J., in giving judgment, at p. 848 said: "Where the interest appears on the face of the transaction to be excessive, whether it is 100 per cent. or less, the further inquiry has to be undertaken, namely, whether the interest is so excessive as to make the transaction harsh and unconscionable. That inquiry must be made, not upon an application for summary judgment under Order XIV., but before a tribunal which has the parties and the witnesses before it."

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be observed that these expressions of opinion as to the possible consequences of "so excessive" interest are at present dicta only. Further, they are dicta in cases where the question was whether there should be further investigation, and not where the facts were ascertained, and the question was what decision should be given on them. No judge, at any rate in the High Court, has yet held in any reported case that any particular rate of interest proved before him, say, even 500 per cent. or anything of the kind, is "so excessive" as to be in itself harsh and unconscionable. When, if ever, any judge does so we shall have to read into the Act that which, as it seems to me, the Legislature intentionally avoided putting there, viz., a maximum rate of interest such as was enacted by the old usury laws. I cannot help thinking that it is owing to a complete misunderstanding of these dicta that an idea seems to prevail in some quarters that if only it is shewn that a high rate of interest has been charged by a moneylender a judge has complete power at his discretion to make a new contract for the parties. I am sure that those two learned Lords Justices meant nothing of that kind. They may have meant that a very high rate of interest might raise a presumption that that rate had been extorted by conduct harsh and unconscionable, or they may have meant that the same circumstances which shewed that the rate was excessive might and often would shew that the transaction was harsh and unconscionable. At the end of the judgment of Cozens-Hardy L.J. in *In re A Debtor* (1), he expressly says that in considering whether the interest is excessive the Court must have regard to all the circumstances of the case, which is the proposition upon which, I think, the whole matter turns. In *Saunders* v. *Newbold* (2) the borrower was found by Kekewich J. to have had his business capacity in fact impaired by habits of intemperance, although the judge thought that this had not gone to such an extent as to be apparent, so that the moneylenders were justified in dealing with him as a person of capacity. Under those circumstances the judge naturally did not consider that the fact that a man so incapacitated had agreed to pay the interest was a material circumstance to be considered on the question

(1) [1903] 1 K. B. at p. 711. (2) [1905] 1 Ch. 260.

whether the interest was excessive under the circumstances. Nor should I consider it material in such a case; but here I am satisfied that the defendant is a man of good business ability. The grounds on which Kekewich J. held, and the Court of Appeal affirmed, that the transaction was harsh and unconscionable do not appear to apply to my case, though no doubt the judgments support the argument of the learned counsel for the defendant in this case that the risk is very material to be considered. Then there is a case of *Poncione* v. *Higgins* (1), also before the Court of Appeal. There Vaughan Williams L.J. says as to the Moneylenders Act: "The intention of the Legislature was to deal with cases of persons in financial distress coming to moneylenders in order to get out of their financial distress, which was often urgent and pressing, and not to deal with the case of persons who were in a position to make their own bargain on terms of equality with the moneylender." That seems to me a very important expression of opinion. The facts of that case were so different to those before me that it is unnecessary to go into them. Romer L.J. says that in every case the judge should go into all the circumstances under which the loan was made, and points out that in that case the position of the plaintiff (the moneylender) cast on him duties towards the defendant (the lady borrower), that the plaintiff knew the defendant was relying on him, and that the defendant was a "foolish" woman. Under those circumstances the case was, of course, a plain one. Cozens-Hardy L.J. repeats his proposition that the interest might be deemed so extravagantly excessive as alone to satisfy the Court that the transaction was harsh and unconscionable, on which I have already commented. He says also that all the circumstances must be considered, and he enumerates various circumstances which he thinks have to be considered, and he does not amongst them mention that one which seems to me so very material when it is present—viz., the free and voluntary agreement of a competent and intelligent borrower to pay the interest asked; but then that point did not arise on the facts before him, nor, indeed, does it very often arise. Then there is a recent case before Joyce J.—*Part* v. *Bond*. (2) In that case an advance

(1) (1904) 21 T. L. R. 11.

(2) (1903) 93 L. T. 49.

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at a high rate had been made, secured by a second mortgage on some property of the borrower. Joyce J. says: "The Act gives no indication what rate of interest is to be deemed excessive under it, nor what transactions are to be deemed harsh and unconscionable"; and after commenting on the word "harsh," says: "With regard to the rate of interest, I think that the rate of interest is excessive if it be extraordinary, such as much higher than 10 per cent., or even less on a reasonably safe security, and if an excessive rate of interest be obtained merely through the folly or weakness of the borrower or his urgent necessity, real or imaginary, with knowledge on the part of the lender such as he must possess, then in my opinion the transaction is harsh and unconscionable." Now with this statement as to what is harsh and unconscionable I entirely agree; but there is a doubt as to what the learned judge meant to say as to the interest. I think he meant the words "on a reasonably safe security" to apply to the words "much higher than 10 per cent.," as well as to the words "or even much less." That is to say, that he meant if there was a reasonably safe security 10 per cent., or even less, would be excessive. In the case before him there was security. There is, perhaps, something like a market rate for loans on security, but I do not see how there can be any rate, ordinary or extraordinary, for loans on a promissory note without security, and I hardly think the judge would have referred to 10 per cent. in reference to such loans. One of the difficulties of dealing with the question of interest on the footing of what is ordinary or extraordinary is that the efforts of the Legislature to assist borrowers undoubtedly have the effect of raising the normal rate of interest. It is a notorious fact that the Bills of Sale Act, 1882, making void bills of sale not according to a form, had the effect as soon as a few decisions had been given on it of raising the normal rate of interest on moneylenders' bills of sale from 25 per cent. or 30 per cent., which had been about the highest before, to 60 per cent., which became the regular rate. This was pointed out by Cave J., and may easily be verified by a reference to the reported cases on bills of sale. Practically, I think any test as to interest being ordinary or extraordinary is, for the purpose of the Moneylenders Act, out of the question, except,

perhaps in cases of loans on security. There can be no standard rate on personal loans, and where the parties are reasonably on terms of equality a judge cannot, I think, do better than adopt what they themselves have agreed on, although, of course, when that is not the case he has to adjudge what is reasonable as best he can under all the circumstances. I next come to a decision of my own, *Levene* v. *Greenwood* (1), which has been followed in Ireland by the Lord Chief Justice in a case of *Wells* v. *Joyce*. (2) I there held that a default clause understood by the lender but not understood by the borrower made the transaction harsh and unconscionable. To that I quite adhere. There may be some difficulty about the word "harsh," but "unconscionable" seems to me to quite hit that case. Amongst the very things that the Act does mean to hit, and I think does effectually hit, are the money-lender's traps for the unwary. I should not hold 60 per cent. per annum to be of itself necessarily excessive or harsh and unconscionable, though, of course, the circumstances might easily make it so, nor should I hold interest of 1*s.* in the pound per month (which, of course, is 60 per cent. per annum) to be necessarily so either; but if I found, as would most likely be the case, that the interest was put into the shape of 1*s.* in the pound per month in order to disguise it, and that in fact the borrower had not appreciated it, I should then hold that the interest was both excessive and harsh and unconscionable. In the present case there was a default clause, but I think the defendant quite understood and appreciated it. He was clearly confident in his ability to pay and that he would not make default, and when this clause was under discussion what he said was in substance that he was more likely to want to pay before it was due than to get into arrear, and wanted to know what reduction would be made in that case. This case does not seem to me to be at all the same as *Levene* v. *Greenwood*. (1) I would also point out that the Moneylenders Act does not, as the Bills of Sale Act, 1882, did, require that the interest should be rateable interest. When a loan is to be for an indefinite time, of course the rate of interest is all-important, but where the loan is for a definite period, repayable by instalments or otherwise, I do not think the

(1) (1904) 20 T. L. R. 389. (2) [1905] 2 I. R. 134.

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borrower generally cares very much what the rate of interest on the amount from time to time outstanding as his instalments are paid works out at. What he does want to know is how much he is to pay for getting the accommodation which he asks, and when a person of intelligence and business habits ascertains and understands that, I am not sure that it is very material whether he understands the real rate per annum of the interest or not. Assuming, however, that he is willing to pay the sum asked of him for the loan for a year, he probably will not be willing to pay that sum for the loan for a month only, and consequently a default clause not understood is in my opinion a trap.

I have now gone through all the cases, and the conclusion at which I arrive is that the judge is entitled to consider amongst "all the circumstances of the case" the fact that the borrower thoroughly understood the transaction, and, without any misrepresentation or any pressure other than the mere request to pay so much interest, voluntarily agreed to pay it, and I myself think that when the judge finds those to be the facts he ought to find that the interest which the man so agrees to pay is reasonable and, therefore, not excessive within the meaning of the Act. I do so find. I think I ought to add that this view of the Act in no way interferes with its operation in all the cases to which it was, as Vaughan Williams L.J. pointed out, really meant to apply. Whenever the borrower is in such a state that his agreement cannot be taken as a test of what is reasonable—when he is ignorant, when advantage is taken of him, or when his necessities are such that he practically has no free will—there is no difficulty in applying the Act, and judges are not likely to hesitate to apply it. I ought further to say that if in this case I found that the defendant had from the first intended not to pay the interest contracted for, but meant to lay a trap for the moneylender and take his money, and then, when he had repaid by instalments the amount of actual money received, to set up the Moneylenders Act and claim to be relieved from payment of the interest contracted for, I should hold that that conduct also would be a circumstance which I ought to take into consideration, and that I ought to hold in that case that it was most reasonable that he should pay what he contracted to pay.

He was, to use Vaughan Williams L.J.'s expression, in a position to bargain on terms of equality with the moneylender. The very able argument of the defendant's counsel, Mr. Napier, was based mainly on the absence of risk by reason of the defendant's ability to pay. If it were the case, which I am afraid often happens, of a borrower yielding to pressure put upon him by a moneylender taking advantage of his necessities, I should not say that the mere fact of his knowing of the Moneylenders Act and intending to try and get the benefit of it to relieve him of some part of what he had under pressure agreed to would disentitle him to that relief; but for a man in the position this defendant was to take the loan on the plaintiffs' terms, apply the money for the purpose for which he wanted it, and then turn round and say that he would not pay the agreed price of the accommodation because it was excessive, is a very different case, and I should have no hesitation in saying that as against him it was not excessive. I have already said that I was not prepared to find that this was the true explanation of this defendant's conduct, but rather assume that he is, as he appeared to be, a respectable man who would not so act.

I have based my judgment in this case on the ground that the interest must in the special circumstances of this case be adjudged to be reasonable and therefore not excessive, but I must add that I am quite unable to see how on the facts the transaction can possibly be said to be harsh and unconscionable. Whatever may come within the true meaning of those words as used in the Act, they certainly do refer in some way to the conduct of the moneylender. Here all he did was to name his price for a loan without security to a man whom he did not know, depending only on his personal assurance that he had means to repay, with such corroboration as seeing the style in which he lived and the furniture and pictures which he claimed to be his afforded. That price the borrower, without being in any really pressing necessity, immediately agreed to give without any bargaining or remonstrance, merely asking one question and getting a satisfactory answer. Even if the price asked was higher than would be expected to be agreed to between two parties bargaining on equal terms, why is the

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mere proposal of the terms harsh and unconscionable? I fail to see that it is. I therefore give judgment for the plaintiffs for the 62*l.* 10*s.* I do not give any interest, as the last instalment is only just due, but I do give High Court costs. If the defendant desires a stay he can have it on paying the money into Court.

Judgment for plaintiffs.

Solicitors for plaintiffs: *White & Co.*

Solicitor for defendant: *W. S. Crookes.*

F. O. R.

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Dec. 19.

TYLER, APPELLANT; FERRIS, RESPONDENT.

Weights and Measures—Prosecution by Inspector—"With the Consent of the Local Authority"—General Consent—Weights and Measures Act, 1904 (4 *Edw.* 7, *c.* 28), *s.* 14.

It is not necessary under s. 14 of the Weights and Measures Act, 1904, which provides that an inspector of weights and measures may, with the consent of the local authority, prosecute before a Court of summary jurisdiction any information arising under the Weights and Measures Acts, that a separate consent shall be given by the local authority in each particular case; a general consent that a named inspector shall prosecute is sufficient.

CASE stated by justices.

An information was preferred by the appellant, who was the inspector of weights and measures for the western district of the county of Middlesex, under s. 25 of the Weights and Measures Act, 1878, against the respondent, for that the respondent, on February 8, 1905, at the parish of Chiswick, did unlawfully have in his possession for use for trade one 2 lb. weight which was unjust, contrary to the statute in that case made and provided.

Upon the hearing of the information the following facts were admitted or proved:—

The appellant was the inspector of weights and measures for the western district of the county of Middlesex.

The information prosecuted by the appellant was an information arising under the Weights and Measures Acts.

The respondent, on the date in question, had in his possession for use for trade a 2 lb. weight which was unjust.

The appellant had the consent of the local authority to prosecute generally before a Court of summary jurisdiction or justices any information, complaint, or proceeding arising under the Weights and Measures Acts, but the local authority did not, in fact, specifically direct the present prosecution.

The consent was contained in a resolution of the Middlesex County Council passed on February 23, 1905, which was in the following terms:—"That the county council do hereby consent to Mr. Walter Tyler, the inspector of weights and measures for the western district of the county of Middlesex, prosecuting before a Court of summary jurisdiction or justices, any information, complaint, or proceeding arising under the Weights and Measures Acts or in the discharge of his duties as such inspector."

It was contended on behalf of the respondent that under s. 14 of the Weights and Measures Act, 1904 (1), a special consent must be obtained by an inspector for every separate information, complaint, or proceeding prosecuted by him under the Weights and Measures Acts, and that the general consent produced by the appellant was not sufficient.

It was contended on behalf of the appellant that the consent produced by the appellants was a sufficient consent within the meaning of the said section, and that there was no obligation under the said section to obtain a special consent for every separate information, complaint, or proceeding prosecuted by him under the Weights and Measures Acts.

The justices found on the facts that the respondent had committed an offence under s. 25 of the Weights and Measures Act, 1878 (41 & 42 Vict. c. 49); but they were of opinion that the consent produced by the appellant was not in law a sufficient consent within the meaning of s. 14 of the Act of 1904, and that under that section an inspector, before he could prosecute any

(1) Weights and Measures Act, 1904 (4 Edw. 7), c. 28, s. 14: An inspector of weights and measures may, with the consent of the loca authority, prosecute before a Court of summary jurisdiction or justices any information, complaint or proceeding arising under the Weights and Measures Acts or in the discharge of his duties as such inspector.

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information, complaint, or proceeding under the Weights and Measures Acts, must obtain a special consent for each separate prosecution. The justices therefore dismissed the information subject to this case.

The question for the opinion of this Court was whether, upon the above statement of facts, the justices came to a correct determination in point of law, and, if not, what should be done in the premises.

Eustace Hills, for the appellant, having read the case, the Court called on

Clarke Hall, for the respondent. The decision of the justices was right. In all previous statutes enabling the officials of public bodies to conduct prosecutions before justices it has been provided that the person so enabled shall do so with the authority of, or be authorized by, the body employing him (1), and it has no doubt been held that a general authority is sufficient. In the Weights and Measures Act, 1904, the word "consent" is used for the first time, and the use of that word shews that the consent must be specially given for each occasion, for a local authority cannot consent by anticipation to something of which it has no knowledge. There is good reason for requiring a separate consent for each prosecution in cases under this Act, for it deals with a class of offence which may be committed quite inadvertently, and it is therefore most important that the question whether proceedings should be taken should in each case be considered by the local authority itself, and not left to the official.

[He referred to *Isle of Wight Ferry Co.* v. *Ryde Commissioners* (2), *Rex* v. *Turner*. (3)]

LORD ALVERSTONE C.J. In this case an ingenious argument has been raised by counsel for the respondent founded upon the use of the word "consent" in s. 14 of the Weights and Measures Act, 1904. There have been several Acts of Parliament allowing local authorities and other public bodies to authorize their officials to take proceedings and conduct prosecutions before

(1) See, for example, the Inland Revenue Regulation Act, 1890, s. 27, and the Factory and Workshop Act, 1901, s. 120.

(2) (1861) 25 J. P. 454.

(3) (1894) 58 J. P. 320.

justices, and it is argued that because in this Act it is provided that the inspector may take proceedings "with the consent of the local authority," the use of the word "consent" instead of "authority" shews that the consent must be specially given in each particular case. I do not agree with that argument. In my opinion s. 14 provides that an inspector is a person who may conduct prosecutions if the local authority consent to his doing so. If it had intended that a separate consent was to be given in each case, I should have expected to find in the Act a very much clearer expression of that intention. The case must go back to the justices for them to convict.

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LAWRANCE and RIDLEY JJ. concurred.

Appeal allowed.

Solicitor for appellant: *Sir R. Nicholson.*
Solicitor for respondent: *W. T. Ricketts.*

F. O. R.

[CROWN CASE RESERVED.]

THE KING *v.* PAYNE.

1905
Dec. 9.

Criminal Law—Indictment—Form—Receipt of Money Stolen by Wife from Husband—Indictment for Misdemeanour—Absence of Allegation that Thief was Wife of Person from whom Money Stolen—Larceny Act, 1861 (24 & 25 *Vict.* c. 96), *s.* 91—*Married Women's Property Act*, 1882 (45 & 46 *Vict.* c. 75), *ss.* 12, 16.

An indictment charging as a misdemeanour the receipt by a person of money in fact stolen by a wife from her husband knowing the money to have been stolen is good, inasmuch as the stealing by a wife of her husband's property does not amount to a felony either at common law or by virtue of the Larceny Act, 1861, but is made a criminal offence by the Married Women's Property Act, 1882, and therefore the receiving of such stolen property is not a felony within the meaning of s. 91 of the Act of 1861; and as there is no other statute making such receipt a felony, it is a misdemeanour only. It is not necessary (although it may be better) to insert in the indictment an allegation that the money belonged to the husband and had been stolen from him by his wife.

CASE stated by the Common Serjeant of London.

The prisoner William Payne was tried at the November

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Session of the Central Criminal Court on an indictment of which the following is a copy:—

Central Criminal Court to wit. } The jurors for our Lord the King upon their oath present that William Payne on the sixth day of August in the year of our Lord one thousand nine hundred and five at the parish of All Saints, Poplar, in the county of London and within the jurisdiction of the said Court, certain money, to wit eighty-six pounds of the moneys of John William Price before then feloniously stolen, taken and carried away unlawfully, did receive and have, he the said William Payne then well knowing the said money to have been feloniously stolen, taken and carried away against the peace of our Lord the King, his Crown and dignity.

It was proved that the money was stolen by Caroline Price, and that she was the wife of John William Price. There was evidence that William Payne received the money so stolen, knowing both that Caroline Price was the wife of John William Price and that she had stolen the money from him.

Before the trial of William Payne, Caroline Price pleaded guilty to stealing the money from her husband.

It was contended by counsel for the prisoner:—

(1.) That the indictment was bad in law, as alleging the receipt of money stolen by a common law larceny, which is by statute a felony, and charging such receiving as a misdemeanour.

(2.) That the facts proved did not support the indictment, as it did not state that the goods were stolen by a wife from her husband.

(3.) That the receipt of goods with knowledge that they were stolen by a wife from her husband was not a misdemeanour.

The prisoner was found guilty, and sentence was postponed, the following questions being reserved for the consideration of the Court for Crown Cases Reserved:—

(1.) Is the indictment bad after verdict?

(2.) Do the facts proved support the indictment?

(3.) Is the receipt of goods with knowledge that they have been stolen by a wife from her husband a misdemeanour?

The prisoner was committed to prison pending the decision of the Court.

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H. C. Jenkins, for the prisoner. The question is whether the misdemeanour which is alleged in the indictment is merged in consequence of the crime committed by the prisoner being a felony. The principle laid down in *Rex* v. *Cross* (1) governs the present case.

[LORD ALVERSTONE C.J. If the receiving with which the prisoner is charged is not a felony by virtue of s. 91 of the Larceny Act, 1861 (2), or at common law, why is it not

(1) (1702) 1 Ld. Raym. 711.

(2) By the Larceny Act, 1861 (24 & 25 Vict. c. 96), s. 91: "Whosoever shall receive any chattel, money, valuable security, or other property whatsoever, the stealing, taking, extorting, obtaining, embezzling, or otherwise disposing whereof shall amount to a felony, either at common law or by virtue of this Act, knowing the same to have been feloniously stolen, taken, extorted, obtained, embezzled, or disposed of, shall be guilty of felony, and may be indicted and convicted either as an accessory after the fact or for a substantive felony, and in the latter case, whether the principal felon shall or shall not have been previously convicted, or shall or shall not be amenable to justice; and every such receiver, howsoever convicted, shall be liable, at the discretion of the Court, to be kept in penal servitude for any term not exceeding fourteen years and not less than three years,—or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement, and, if a male under the age of sixteen years, with or without whipping: Provided, that no person, howsoever tried for receiving as aforesaid, shall be liable to be prosecuted a second time for the same offence."

By the Married Women's Property Act, 1882 (45 & 46 Vict. c. 75), s. 12: "Every woman, whether married before or after this Act, shall have in her own name against all persons whomsoever, including her husband, the same civil remedies, and also (subject, as regards her husband, to the proviso hereinafter contained) the same remedies and redress by way of criminal proceedings, for the protection and security of her own separate property, as if such property belonged to her as a feme sole, but, except as aforesaid, no husband or wife shall be entitled to sue the other for a tort. In any indictment or other proceeding under this section it shall be sufficient to allege such property to be her property; and in any proceeding under this section a husband or wife shall be competent to give evidence against each other, any statute or rule of law to the contrary notwithstanding: Provided always, that no criminal proceeding shall be taken by any wife against her husband by virtue of this Act while they are living together, as to or concerning any property claimed by her, nor while they are living apart, as to or concerning any act done by the husband while they were living together, concerning property claimed by the wife, unless such property shall have been wrongfully taken by the husband when leaving or deserting, or about to leave or desert, his wife."

By s. 16: "A wife doing any act

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a misdemeanour? At the time the Act of 1861 was passed a wife could not steal her husband's goods. You must contend that the Married Women's Property Act, 1882, enlarges the ambit of the Larceny Act, 1861, and makes the theft by a wife of her husband's property a felony under s. 91 of the Larceny Act, 1861, so that the receipt by the prisoner of the stolen goods also amounts to a felony by virtue of that section.]

At the present time there is no statute making the receipt by the prisoner a felony, and therefore he cannot be convicted at all. *Reg.* v. *Streeter* (1) shews that the prisoner could not have been indicted for felony.

Secondly, this indictment is bad upon the ground that it does not upon the face of it disclose any offence in law. The prisoner is charged with a misdemeanour, and there is nothing upon the face of the indictment to shew that it is not an ordinary case of feloniously receiving goods within the meaning of s. 91 of the Act of 1861, knowing them to have been feloniously stolen, either at common law or under the Act of 1861. The indictment ought to have contained something to shew that it was a receiving which was a common law misdemeanour; it ought to have contained an allegation that the money was stolen by a wife from her husband, and that the prisoner received it knowing it to have been so stolen.

[LORD ALVERSTONE C.J. That appears to be contrary to the decision in *Rex* v. *James*. (2)]

[Chitty on Criminal Law, 2nd ed. p. 951a; Foster's Crown Cases, p. 373; Archbold's Criminal Pleading, 23rd ed. p. 21; and the Accessories and Abettors Act, 1861 (24 & 25 Vict. c. 94), s. 4, were also referred to.]

No counsel appeared for the prosecution.

LORD ALVERSTONE C.J. In my judgment this conviction must be affirmed. Upon behalf of the prisoner it has been contended

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with respect to any property of her husband, which, if done by the husband with respect to property of the wife, would make the husband liable to criminal proceedings by the wife under this Act, shall in like manner be liable to criminal proceedings by her husband."

(1) [1900] 2 Q. B. 601.

(2) [1902] 1 K. B. 540.

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that the offence which he committed amounted to felony, and that therefore upon an indictment for misdemeanour the prisoner could not be convicted. If it could have been established that the offence which the prisoner committed was made felony either by s. 91 of the Larceny Act, 1861, or by any other statute, the objection to the conviction would have been good. But we cannot uphold the contention consistently with *Reg.* v. *Smith* (1) and *Reg.* v. *Streeter.* (2) In *Reg.* v. *Smith* (1), where there was an indictment under s. 91 of the Larceny Act, 1861, for receiving goods knowing them to have been feloniously stolen, it was held that it is not an offence under s. 91 of that Act to receive stolen goods knowing them to have been stolen, if the stealing is not a crime either at common law or under the Act of 1861, although the stealing is a felony under s. 1 of the Larceny Act, 1868. A considered judgment of the Court, composed of Bovill C.J., Willes, Byles and Hannen JJ., and Cleasby B. was delivered. Bovill C.J. went at length into the matter, and decided that in order to support an indictment under s. 91 of the Act of 1861 for receiving goods knowing them to have been feloniously stolen, there must be a stealing which amounts to a felony either at common law or under s. 91 of the Act of 1861. That case being decided in 1870, in *Reg.* v. *Streeter* (2) a point somewhat nearer that arising in the present case was considered. In that case property had been stolen by a wife from her husband, and the Married Women's Property Act, 1882, was in force. The point therefore was open for argument that the Married Women's Property Act, 1882, had extended the ambit of the Larceny Act, 1861, so as to bring within that Act the stealing by the wife of the husband's goods, and that therefore a felony had been committed by her under the Act of 1861, which by virtue of s. 91 rendered the receipt of the goods knowing them to have been stolen a felony. The head-note of that case in the Law Reports correctly states the decision. Mathew J., referring to s. 91 of the Larceny Act, 1861, to the Larceny Act, 1868, and to certain sections of the Married Women's Property Act, 1882, comments upon *Reg.* v. *Smith* (1), which he says "was a case in which partnership property had been stolen by a partner and

(1) (1870) L. R. 1 C. C. R. 266. (2) [1900] 2 Q. B. 601.

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received by the prisoner, the stealing being a criminal offence by virtue of the Larceny Act, 1868, and it was held that the prisoner could not be convicted of receiving under the Larceny Act, 1861, s. 91. Our decision must be to the same effect . . . ." Wright J. said: "I agree that this prisoner could not be properly convicted under the Larceny Act, 1861, s. 91; but in future cases it seems that there might be an indictment for receiving at common law." Wright J., in making this observation, must have had in his mind an indictment for misdemeanour. Counsel for the prisoner has been unable to point out any other statute under which an indictment could be framed for feloniously receiving the goods. The decisions in *Reg.* v. *Smith* (1) and *Reg.* v. *Streeter* (2) turned upon the express words of s. 91 of the Act of 1861. We cannot give effect to the argument upon behalf of the prisoner in the present case without overruling those decisions. If there had been any statute making the receiving of the goods stolen by a wife from her husband a felony, the present case would have been brought within the decision in *Rex* v. *Cross.* (3) But as that cannot be done, in my opinion the first objection to the indictment fails.

The second objection, viz., that the indictment only states that the goods were feloniously stolen from Price and received by Payne, raises the same kind of question as that which we considered in *Rex* v. *James* (4); this objection taken upon behalf of the prisoner is that it should have appeared upon the face of the indictment that the goods were stolen under such circumstances that there was no offence at common law or under the Larceny Act, 1861. In my opinion to give effect to this objection would be contrary to the principle of our decision in *Rex* v. *James.* (4) The conviction must be affirmed.

LAWRANCE J. I am of the same opinion.

CHANNELL J. I agree. I think there is a little more doubt about the second objection, but on the whole I think that *Rex* v. *James* (4) covers it. I would, however, venture to suggest that in drawing an indictment in future for receiving property

(1) L. R. 1 C. C. R. 266.
(2) [1900] 2 Q. B. 601.
(3) 1 Ld. Raym. 711.
(4) [1902] 1 K. B. 540.

stolen by a wife from her husband, it would be better to allege that the property stolen belonged to the husband and was stolen from him by the wife.

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WALTON J. I agree.

SUTTON J. I also agree.

Conviction affirmed.

Solicitor for the prisoner: *Cyril Renton.*

F. O. R.

[IN THE COURT OF APPEAL.]

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Nov. 22.

BANNATYNE *v.* D. & C. MACIVER.

Principal and Agent—Borrowing by Agent—Excess of Authority—Debts of Principal paid with Money borrowed—Belief of Lender in Authority of Agent—Equitable Right of Lender to Recover.

The defendants, a country firm, opened a branch of their business in London, and appointed an agent to carry it on. The defendants had an account with a London bank in their name, upon which the agent was entitled to draw. The agent had no authority to borrow money, but the banking account being low, he borrowed a sum of money of the plaintiff, who was told that it was for the use of the firm, and believed that the agent had authority to borrow. The money was paid into the bank, and part of it was used by the agent in the payment of obligations of the defendants. Subsequently the defendants supplied further sums of money, which would have been sufficient to meet their obligations, but for the agent drawing, on his own account, sums to which he was not entitled. The agent meanwhile borrowed other sums of money of the plaintiff, portions of which were alleged to have been used in discharging further obligations of the defendants. In an action to recover the amount so borrowed:—

Held that, to the extent to which the money borrowed should be found on inquiry to have been in fact applied in paying legal debts of the defendants, the plaintiff was entitled in equity to stand in the same position as if that amount had been originally borrowed by them.

APPEAL from the judgment of Grantham J. at the trial without a jury.

The claim on the writ was against the defendants as acceptors of a bill of exchange for 372*l.* 10*s.*, drawn by the plaintiff, or in the alternative for money lent, and for interest. An application was made for judgment under Order XIV., and a direction was

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given that the cause should be placed in the short cause list. The facts as appearing by affidavit or admission were as follows: The defendants were a firm of ship and insurance brokers carrying on business at Liverpool. They established a branch business in London, and appointed one of their clerks named Hudson as manager. There was a banking account with a London bank in the name of the defendant firm, upon which Hudson drew. He was supplied with money from time to time which was paid into this banking account, but at one time there was little or no money in it, and Hudson applied to the plaintiff for a loan. The plaintiff asked whether the loan was for the firm, and on being told by Hudson that it was, he made out a cheque in the name of the firm, which was passed through their London banking account, and entered in their books. This money, or a part of it, was used by Hudson in payment of expenses of the London branch, such as rent, salaries, and other ordinary matters of business. The defendants alleged that one of the terms on which Hudson was engaged was that his salary was dependent on the profits made by the London branch, and that they, subsequently to the loan above mentioned, sent him considerable sums of money, more than sufficient to cover the liabilities of the branch, and rendering any borrowing by Hudson unnecessary. They further alleged that, although no profits were made, Hudson drew from the London banking account large sums of money on his own account. It appeared that Hudson, subsequently to the first loan, borrowed, on three occasions, other sums of money from the plaintiff, the whole amount so borrowed being 350*l.*, for which, with interest, Hudson accepted, in the name of the firm, the bill upon which the plaintiff sued.

At the trial the defendants called evidence to prove that it was no part of the business of an insurance broker to borrow money, and contended that, as the borrowing was not authorized, they were not liable to the plaintiff. The learned judge took this view, and gave judgment for the defendants.

The plaintiff appealed.

J. R. Atkin (*Scrutton, K.C.*, with him), for the plaintiff. Assuming that Hudson had not authority either express or

implied to borrow money on behalf of the defendants, nevertheless to the extent to which the money borrowed by him has been applied for the defendants' benefit by discharging their liabilities, the plaintiff is entitled to recover by virtue of the well-known equitable doctrine applied in *Blackburn Building Society* v. *Cunliffe Brooks & Co.* (1), on the authority of *In re Cork and Youghal Ry. Co.* (2) In *Wenlock (Baroness)* v. *River Dee Co.* (3), the doctrine was based upon a subrogation of the lender of the money to the rights of the creditor, upon a supposed transaction between the creditor paid off and the lender of the money, by which, in consideration of payment of his debt, the creditor assigned it to the lender. It was questioned in the case of *In re Wrexham, Mold and Connah's Quay Ry. Co.* (4) whether that is the true basis of the doctrine. But, whether it is based on such a subrogation, or on the equitable doctrine of following money, or whatever its true basis may be, there is no doubt that in equity, if the result of the unauthorized borrowing of the money and its application has been that the liabilities of the company have not been extended but remain as before, the lender can recover the money lent. It appears from Lindley on Partnership, 7th ed. p. 219, that this doctrine applies where a partner borrows money on behalf of his firm without authority. In the present case, it is clear on the figures that some, at any rate, of the amount borrowed was applied in payment of the defendants' liabilities. The case was not fully investigated at the trial from this point of view, but it is clear on the books of the defendants that the first sum borrowed from the plaintiff was paid into the banking account of the defendants' London branch business, and the whole, or nearly the whole, of it was applied in payment of liabilities of the business, no other moneys having in the meantime come in which could be so applied. The plaintiff must be entitled to a judgment for some amount in the action and to an account to ascertain the amount due to him.

Carver, K.C., and *Sims Williams*, for the defendants. It is clear that it is an essential condition of the application of the doctrine

(1) (1882) 22 Ch. D. 61.
(2) (1869) L. R. 4 Ch. 748.
(3) (1887) 19 Q. B. D. 155.
(4) [1899] 1 Ch. 440.

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relied on by the plaintiff that the company, or person for whom the money has been borrowed without authority, should not be prejudiced, and that their or his liability shall not be increased by the transaction, and for the purpose of seeing whether that condition is satisfied, the state of their or his account as a whole must be considered; and for this purpose the doctrine of *Clayton's Case* (1), namely, that the items on either side must be applied in order of date, is inapplicable: see *Blackburn Building Society* v. *Cunliffe Brooks & Co.* (2) It has been argued that the plaintiff must be entitled to judgment because, taking the account immediately after the payment of the liabilities of the defendants' branch business, and stopping there, it would appear that, the money borrowed having been applied to payment of these liabilities, the total liability of the defendants was not increased. It is sought to limit the account for this purpose to the period of a few weeks, during which these sums were being borrowed, but this is not the right way of looking at the case. The defendants' case is that Hudson could draw out from the bank on his own account a proportion of any profits that were made, and although no profits were made by the branch he drew sums to which he was not entitled. So far as he took money out of the branch for himself it was he and not the defendants who had the benefit of the borrowed money, and if the defendants have to pay the plaintiff their obligations have been increased by the unauthorized borrowing. Thus neither on the ground of authority to borrow nor on that of benefit to the defendants can they be liable to repay the amount borrowed.

The equity relied on does not arise in an ordinary case of principal and agent, but is confined to the case of companies where money has been borrowed ultra vires.

The cases cited as to the equity are all cases of borrowing by companies, and in the case of partnership it is pointed out in Lindley on Partnership, 7th ed. p. 218, that it is an erroneous notion that if a firm obtains the benefit of a contract made with one of the partners it must needs be bound by that contract, and that the question is not whether the firm obtained the benefit, but whether by one of its partners or otherwise it entered into the

(1) (1816) 1 Mer. 572. (2) 22 Ch. D. 61, at p. 71.

contract. *Smith* v. *Craven* (1) is an example of non-liability of a firm, although benefit has been derived from money supplied to one member. The only true test to apply in such cases as the present is—with whom was the contract made, and are the defendants bound either as having originally authorized the making of the contract or subsequently ratified it.

[They also cited *Knatchbull* v. *Hallett* (2) and *Jacobs* v. *Morris*. (3)]

COLLINS M.R. In this case a man of the name of Hudson was acting in London as the representative of the defendants, and was carrying on a branch of their business in London, and he seems to have been allowed considerable latitude in the conduct of the business. He had an account in the name of the defendant firm at a London bank, and no doubt it is the case that as between himself and his principals he had been spending more money than they desired that he should spend, and they remonstrated with him, but let him go on with the business, and from time to time supplied money to meet his demands. A time came when he had used all the money available at the bank, but there were pressing demands in relation to the branch business, and he borrowed money from the plaintiff, telling him that the money was required for the purposes of the firm, and the plaintiff lent it under the impression that it was for the use of the firm, and had no knowledge of Hudson's want of authority to borrow money.

It is clear upon the admitted facts before us that a certain proportion of the money so borrowed was applied by Hudson in payment of liabilities of the firm.

An application appears to have been made in this action under Order XIV. to enforce the plaintiff's claim, but it is not material to go into that matter, because the claim is now rested on a broader ground. It is said that the plaintiff is entitled in equity to recover from the defendants all such part of the borrowed money as had been applied in discharging their legal liabilities, and the plaintiff sought to have an account taken, and relief given to the extent of the money ascertained to have been so used.

The principle on which the plaintiff bases his claim is that

(1) (1831) 1 Cr. & J. 500. (2) (1880) 13 Ch. D. 696.
(3) [1902] 1 Ch. 816.

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Collins M.R.

stated by Lord Selborne in *Blackburn Building Society* v. *Cunliffe Brooks & Co.* (1), cited and adopted in his judgment by Rigby L.J. in the case of *In re Wrexham, Mold and Connah's Quay Ry. Co.* (2) The Lord Chancellor said: "I think the consistency of the equity allowed in the *Cork and Youghal Ry. Co.'s Case* (3) with the general rule of law that persons who have no borrowing powers cannot, by borrowing, contract debts to the lenders, may be shewn in this way. The test is, has the transaction really added to the liabilities of the company? If the amount of the company's liabilities remains in substance unchanged, but there is, merely for the convenience of payment, a change of the creditor, there is no substantial borrowing in the result, so far as relates to the position of the company. Regarded in that light, it is consistent with the general principle of equity, that those who pay legitimate demands which they are bound in some way or other to meet, and have had the benefit of other people's money advanced to them for that purpose, shall not retain that benefit so as, in substance, to make those other people pay their debts." That is the principle that is said to give the plaintiff the remedy which he seeks in this case, and it certainly appears to me that, on the facts before us, a strong prima facie case has been established. Some money has found its way into the coffers of the firm in this sense—that it was credited to their account at the bank, and has been applied on their behalf in payment of their liabilities. Whether or not it could be recovered at common law by the lender it is not necessary to decide, though I should think that it could not; but we have to apply the general law, legal and equitable, and it appears to me that, so far as the money can be shewn to have been applied for the benefit of the defendants, in paying claims for which they were legally liable, it can be recovered upon equitable grounds. If so, the plaintiff has a right to an account, and to recover such sums as are found to be due upon that account.

The case must go back to have an account taken either before an official referee or someone selected by the parties, and it follows that this appeal succeeds and must be allowed.

(1) 22 Ch. D. 61, at p. 71.

(2) [1899] 1 Ch. 440, at p. 451.

(3) L. R. 4 Ch. 748.

ROMER L.J. I am of the same opinion. I think this case is governed by the general principle which I am about to state. That principle is one that is well recognized in the present day; and is binding upon us. Where money is borrowed on behalf of a principal by an agent, the lender believing that the agent has authority though it turns out that his act has not been authorized, or ratified, or adopted by the principal, then, although the principal cannot be sued at law, yet in equity, to the extent to which the money borrowed has in fact been applied in paying legal debts and obligations of the principal, the lender is entitled to stand in the same position as if the money had originally been borrowed by the principal. That limitation, and its true bearing upon the position of the lender, shewing that he is not exactly in the position of a person who is entitled to stand in the shoes of the creditor in all respects and therefore entitled to the benefit of any securities of the creditor paid off, is clearly put in the decision of the case of *In re Wrexham, Mold and Connah's Quay Ry. Co.* (1), which has been cited in the course of the argument. It was suggested by counsel for the defendants that the principle is limited to the case of agents of limited companies, because the directors are their agents purporting to borrow on behalf of their company, whereas by the constitution of the company the borrowing is unauthorized and cannot be validly made. I need scarcely point out that there is no reason why the principle should be limited to companies, and indeed, if one comes to think of it, the case of such companies as are referred to would be a more difficult case to which to apply the principle than the ordinary case of principal and agent. When directors of a company purport to borrow on behalf of a limited company, the proposed lender might well be supposed to have put upon him the obligation of inquiring into the position of the company and seeing whether the directors are under the circumstances authorized to borrow; and a company, on whose behalf a loan is purported to be effected, cannot in any sense be bound where, by its constitution, it cannot borrow, and a person might well be supposed to be put upon inquiry to see whether the company is in the position of a private principal, for no one can say

(1) [1899] 1 Ch. 440.

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Romer L.J.

that a person lending money to a private principal through an agent has notice that the principal cannot borrow. The case of money lent to such a principal through an agent, where the agent has no authority to borrow on behalf of his principal, seems to me to be an a fortiori case. Certainly the distinction suggested by counsel is not supported by any authority, and, in my view, cannot be supported on principle; indeed, it seems reasonably clear that the principle is applicable in other cases than that of a limited company. Take, for instance, the case where a wife purports to borrow money for the purpose of paying for necessaries. There the borrowing would not make the husband liable at law, even though the money had been, in fact, applied in paying for necessaries for the wife; yet in equity it has been decided that if the money borrowed has, in fact, been applied in the payment of necessaries for the wife, for which the husband would have been legally liable, to that extent the husband is liable to the lender of the money.

The principle to which I have referred clearly governs this case. The facts speak for themselves, and it cannot be said that this is a mere speculative application on behalf of the plaintiff in the hope that he may be able to shew that some legal debts of the defendants have been paid off by means of money lent by the plaintiff. The bankers' account is in evidence before us, and it appears that the money first borrowed went to the credit of the firm's account at their bankers, which was kept by the agent of the branch establishment. It further appears that immediately after the money was paid in some legal debts of the firm were, in fact, paid off at a time when there was nothing in the bank to meet them except the money which had been borrowed of the plaintiff.

In these circumstances the proper course to be taken is that suggested by my Lord—to direct an inquiry to ascertain what debts and legal obligations of the firm were, in fact, paid off by means of the borrowed money. The point that arose in *Clayton's Case* (1), which was referred to in the course of the argument, will have to be borne in mind in ascertaining what debts were paid off; that is to say, what the plaintiff has to prove is actual

(1) 1 Mer. 572.

payment of the debts, and not what I may call a payment by means of an adjustment of accounts. It was suggested that the equitable principle which, in my opinion, governs this case, ought not to be applied if it turns out that, although the borrowed money was, in fact, applied in payment of debts of the firm, the account of the agent with his principals, if it were continued up to the time when this action was brought, would shew that the agent was not a creditor of the firm. It appears to me that this consideration is not relevant. It might be relevant if the plaintiff were seeking to enforce a different equity, that is, the right to stand in the shoes of the agent as against his principal. That is not the equity which the plaintiff is seeking to enforce in this action.

For these reasons I think that the appeal must succeed, and that the inquiry that has been indicated must take place.

MATHEW L.J. concurred.

Appeal allowed.

Solicitor for the plaintiff: *J. S. Wilkinson.*

Solicitors for the defendants: *Charles Russell & Co., for Lightbound, Owen & Co., Liverpool.*

A. M.

1905
Nov. 23, 27.

NORTON *v.* YATES.

Company—Debenture-holder—Floating Security—Receiver—Judgment Creditor—Attachment of Debts—Garnishee Order Nisi—Priority—Rights of Garnishor—Rules of Supreme Court, Order XLV., *r.* 2.

In 1903 a limited company issued a series of debentures creating the usual first charge "by way of floating security" on "all real and personal property now or any time hereafter belonging to the company." On January 17, 1905, Y. & Co. obtained judgment against the company, and on the same day they obtained and served on T. & Sons a garnishee order nisi for a debt of 434*l.* owing by that firm to the company. On January 19, a receiver and manager of the company was appointed in a debenture-holders' action. Notice of this appointment was served on Y. & Co. on January 20. The debt of 434*l.* having been claimed by both the judgment creditor and the receiver, the money was paid into Court. On an interpleader issue to determine the question of priority:—

Held, on the authority of *In re Combined Weighing and Advertising Company*, (1889) 43 Ch. D. 99, that as service of a garnishee order nisi did not operate as an assignment in equity or amount to a transfer of the debt, the right of the garnishor was subject to such rights and equities as already existed over this particular debt as the property of the company; that at the time the garnishee order was served there was an existing charge on this property by virtue of the floating security created by the debentures, which was capable of becoming a specific charge when the debenture-holders intervened, and, consequently, that the receiver was entitled to the money now in Court in priority to the judgment creditor.

The dictum of James L.J. in *Ex parte Joselyne*, (1878) 8 Ch. D. 327, at p. 330, that "the moment the order of attachment was served on the garnishee the property in the debt due from him was absolutely transferred from the judgment debtor to the judgment creditor," must not be taken too literally, but must be read in conjunction with the facts and with what was said by the other Lords Justices in that case.

Robson v. *Smith*, [1895] 2 Ch. 118, distinguished.

This was an interpleader issue which raised the question of priority between debenture-holders of a limited company with the usual floating security and a judgment creditor who had obtained and served a garnishee order nisi in respect of a debt due to the company two days before a receiver in a debenture-holders' action was appointed. The material facts were shortly as follows:—

In February, 1903, Walter Jones & Sons, Limited, issued 200 first mortgage debentures of 50*l.* each, carrying interest at 5½ per cent. Each debenture contained a covenant by the company to pay the principal sum of 50*l.* on September 29, 1920,

with interest in the meantime at the rate aforesaid. The company also charged, "by way of floating security, all real and personal property now or at any time hereafter belonging to the company" (except uncalled capital), with the payment of the principal moneys, and interest thereby secured. The debenture was issued subject to the conditions indorsed thereon.

These conditions provided :—

1. That the debenture was one of a series with the other 200, which were to rank pari passu by way of a first charge on all the property therein referred to, which was to be "a specific charge on the said property; and the company is not to be at liberty to create any mortgage or charge in priority to the said debentures."

2. That the principal thereby secured was to become immediately payable in certain events, inter alia, (*d*) "if any of the property the subject of this security should be taken in execution, or otherwise by operation of law be taken out of the control of the company."

5. That notwithstanding the charge thereby created, the company should be at liberty "in the course of its business and for the purpose of carrying on the same to use employ sell lease exchange or otherwise deal with all or any part of the said property until one or more of the contingencies specified in condition 2 shall have arisen, but from and after the happening of such contingency, the liberty and authority to the company hereinbefore given shall forthwith cease and determine and the charge by this debenture created shall and may be immediately enforceable."

On January 17, 1905, Yates & Co. obtained judgment against the company for 529*l.* 4*s.* 2*d.*, and on the same day they obtained and served on Henry Tate & Sons, Limited, a garnishee order nisi for a debt of 434*l.* 13*s.* 10*d.* owing by that firm to the company.

On January 19, one B. T. Norton was appointed receiver and manager of the company in a debenture-holders' action; the fact of the above judgment against the company being made one of the grounds for the appointment. Notice of this appointment was forthwith served on Yates & Co. by letter, which was received

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by them on January 20, on which day the garnishee order nisi was made absolute.

On February 9, in consequence of the claim by the receiver to the garnished debt, Henry Tate & Sons, Limited, were ordered to pay the amount 434*l.* 13*s.* 10*d.* into Court, to abide further order. This amount, with other debts that had also been garnished, was paid into Court.

On March 1, on the hearing of an application by Yates & Co. by a summons for payment out to them of the money in Court, the master directed an issue to be tried before a judge between the receiver, and certain other debenture-holders who had been added, as plaintiffs, and Yates & Co. as defendants, whether the plaintiffs, or any of them, were entitled as against the defendants to the money in Court.

This issue came on to be tried before Warrington J., sitting as an additional judge of the King's Bench Division, when the whole of the argument was addressed to the effect of the garnishee order nisi in respect of the 434*l.* 13*s.* 10*d.* owing to the company from Henry Tate & Sons, Limited; this being the case that was admitted to be the most unfavourable to the claim of the receiver.

C. E. E. Jenkins, K.C., and *Leck*, for the receiver. A garnishee order nisi, when served, only "binds the debt" in the hands of the debtor, to use the words of Order XLV., r. 2; it does not amount to a transfer, and only prevents the debtor from dealing with it: *In re Combined Weighing and Advertising Machine Co.* (1); it seems clear from that case that a garnishee order does not amount to an assignment in equity, or to a transfer of the debt, and that the garnishor is not a creditor who can obtain a winding-up order. In garnishee proceedings the judgment creditor obtains only what the debtor can honestly give him, and third parties are not prejudiced: *Cole* v. *Eley.* (2)

If a garnishee order has been made absolute, the garnishee may pay the debt to the judgment creditor notwithstanding notice by a debenture-holder of his claim: *Robson* v. *Smith* (3);

(1) 43 Ch. D. 99.

(2) [1894] 2 Q. B. 180, 187.

(3) [1895] 2 Ch. 118.

but in that case the debt was paid under compulsion, and the company was a going concern.

In the case of a writ of fi. fa., the debenture-holder can intercept the creditor's rights after execution, by obtaining a receiver: *In re London Pressed Hinge Co., Ld.* (1); unless the goods have been actually sold by the sheriff. There is no express decision on the present point, but the service of a garnishee order nisi is analogous to seizure under a fi. fa.

The garnishor cannot be in a better position than a person having a charge, and this charge can only take effect subject to the existing charge created by the debenture. By condition 5 the company is entitled "in the course of its business" to deal with all its property until the security is crystallized by the happening of one of the contingencies specified in condition 2 or by the appointment of a receiver: *In re Horne and Hellard* (2); *Governments Stock and other Securities Investment Co.* v. *Manila Ry. Co.* (3) When the security no longer floats the rights of the debenture-holders prevail over all charges, created or obtained subsequently to the issue of the debenture.

Gore Browne, K.C., and *Disturnal*, for debenture-holders who had been added as plaintiffs at their own request, adopted the above argument; and further contended, on the authority of *Davey & Co.* v. *Williamson & Sons* (4), that even if no receiver had been appointed the rights of the debenture-holders must prevail over the claim of the judgment creditor, as the debt thus garnished was property of the company, which was already validly charged with payment of the debentures.

Manisty, K.C., J. G. Wood, and *E. Morten*, for the defendants, Yates & Co., the judgment creditors. There is no analogy between garnishee proceedings and a fi. fa. By garnishee proceedings a creditor obtains security in a much shorter time than by fi. fa. If a winding-up order is made against a company before goods of the company which have been seized by the sheriff have been sold, the Court will restrain the sale; but the Court cannot interfere if there is a garnishee order nisi which has been served: *In re*

(1) [1905] 1 Ch. 576, at p. 581.
(2) (1885) 29 Ch. D. 736.
(3) [1897] A. C. 81.
(4) [1898] 2 Q. B. 194.

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Hill Pottery Co. (1); *In re English and Scottish Life Insurance Co.* (2)

Under a writ of fi. fa. the goods of the judgment debtor are seized; nothing is seized under a garnishee order. A creditor who has served a debtor with a garnishee order nisi is a secured creditor: *Lowe* v. *Blakemore.* (3) Even if there is no transfer of the debt, the right to receive payment is in the garnishor: that right cannot be disturbed in favour of holders of debentures which have not crystallized. In *Ex parte Joselyne* (4), James L.J. at p. 330 says that "the moment the order of attachment was served upon the garnishee, the property in the debt due from him was absolutely transferred from the judgment debtor to the judgment creditor." That case shews that a garnishor is a secured creditor and has rights superior to those of the trustee in bankruptcy of the debtor. The defendants are in the same position as if the garnishee order had been made absolute before the receiver was appointed.

These debentures were a floating security till the debenture-holders actually intervened. The debenture, in terms, gives power to the company to deal with its property in the ordinary course of business, including the right to incur debts and suffer garnishee proceedings. They might have assigned a book debt as satisfaction of a liability: *In re Yorkshire Woolcombers' Association* (5), *Governments Stock, &c., Co.* v. *Manila Ry. Co.* (6) The company have not created a "charge" in priority to the debentures, they have only been dealing with a book debt in the ordinary course of business. If the debt had been paid to the company, they might have paid us out of the proceeds. This dealing has been completed and we are within *Robson* v. *Smith* (7), which was followed in *Robinson* v. *Burnell's Vienna Bakery Co.* (8) The question in *Davey & Co.* v. *Williamson & Sons* (9), was whether the security had crystallized. It is not an authority for saying that this was not a "dealing." This is a dealing by the

(1) (1866) L. R. 1 Eq. 649.
(2) (1868) L. R. 5 Eq. 300.
(3) (1875) L. R. 10 Q. B. 485.
(4) 8 Ch. D. 327.
(5) [1903] 2 Ch. 284.
(6) [1897] A. C. 81.
(7) [1895] 2 Ch. 118.
(8) [1904] 2 K. B. 624.
(9) [1898] 2 Q. B. 194.

Court with the property of the debtor and therefore a higher thing than a dealing by the company.

The debenture-holders are not entitled to demand payment of this debt, they are only entitled to a charge on the property of the company as it existed at the date when the receiver was appointed: Buckley on Companies, 8th ed. p. 188. The essence of a "floating security" is that the charge is inchoate only, and if a third person comes in first and completes his right to receive this debt by means of a garnishee order, the floating security crystallizes subject to this completed right.

[WARRINGTON J. *Badeley* v. *Consolidated Bank* (1) seems to shew that rights under a garnishee order only attach that which can be properly dealt with without a violation of the rights of other persons.]

[*Gore Browne, K.C.*, referred to *Chatterton* v. *Watney* (2) as to the effect of a garnishee order on the debt due from the garnishee.]

The effect of a garnishee order was fully considered in *Pritchett* v. *English and Colonial Syndicate* (3) when the correctness of the decision in *In re Combined Weighing and Advertising Machine Co.* (4), on which the plaintiffs mainly rely, is doubted.

[*Geisse* v. *Taylor* (5) was also cited.]

The result of these authorities would seem to be that the debenture-holders can only take subject to the prior right of the garnishor.

WARRINGTON J., after stating the facts, and the terms of the debenture and the conditions indorsed thereon, reading condition 5 at length as being the most important, continued:— The first question is, what is the effect of the garnishee order? It is, perhaps, easier to say what its effect is not, than to say positively what it is, and for present purposes it will be enough for me to say what its effect is not. That question arose in *In re Combined Weighing and Advertising Machine Co.* (4), though the main point was whether the judgment creditor under

(1) (1888) 38 Ch. D. 238, at p. 257.
(2) (1881) 17 Ch. D. 259.
(3) [1899] 2 Q. B. 428.
(4) 43 Ch. D. 99.
(5) [1905] 2 K. B. 658.

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a garnishee order became a creditor of the garnishee; in other words, did the order operate as an assignment of the debt by way of security or otherwise so that the garnishor could to that extent stand in the place of the original creditor, and become a creditor of the garnishee? The Court of Appeal held that the garnishor was not a creditor of the garnishee; or in other words, that the garnishee order did not amount to an assignment, either absolutely or by way of security. I think that perhaps Bowen L.J. puts the effect of the garnishee order in the way which is of most use for the purposes of the present case. At p. 105 he says, after referring to the mode in which a garnishee order is obtained and the object of it: "There cannot be said to be any equitable debt. There is no assignment in equity, and I cannot see that there is any legal debt. There is an order of a Court of Common Law that a sum equal to the original debt shall be paid by the garnishee to the judgment creditor, or as an alternative that execution may issue; but I think that the relation which is created by that section and the orders made under it does not create a debt at all: it creates an attachment of a portion of the debt, and in case of non-payment confers the right of issuing execution and nothing more."

Fry L.J. puts it in rather a different way. After referring to the rules, he says this, at p. 105: "The question, I take it, is, what is the meaning of the words 'bind the debt in his hands?' Now, it has been argued that it amounts to a transfer of the debt. If that was the meaning, it is remarkable that that word was not used, and that the order does not say 'transfer' the debt; but, further than that, the whole scheme of the order is inconsistent with its being a transfer of the debt. It is plain to my mind that there is no transfer of the debt. It is equally plain to my mind that the garnishee order, therefore, does not make the garnishor a creditor of the garnishee." So far he has only explained what it is not. He goes on now to say what he thinks it is: "What the order does is this, it gives the garnishor certain statutory rights; it enables the garnishor to say to the garnishee, 'You shall not pay to your creditor the money which you owe him.' It enables him to give a valid receipt and discharge for the money. It enables him, in the event of the

money not being paid, to obtain execution. He has all those rights, but there is no transfer of the debt, and he is not created a creditor." That case, therefore, decided that there was no transfer of the debt. As Bowen L.J. puts it, the effect of the order is to direct the garnishee to pay a sum of money equivalent to the debt, not the debt itself, to the judgment creditor. No doubt the payment by the garnishee of that equivalent sum operates as a discharge of the debt. That, although not dealt with by Bowen L.J., is shown by Fry L.J., because, after saying that it enables the garnishor to say to the garnishee, "You shall not pay your creditor," he goes on to say, "It enables him to give a valid receipt and discharge for the money." I think that that case settled the law with regard to the effect of the garnishee order. But it was said that in an earlier case, that of *Ex parte Joselyne* (1), the Court of Appeal had gone a little further than the case I have just dealt with, and that James L.J., at all events, had expressed his opinion that the effect of the garnishee order nisi was an absolute transfer of the debt, so that the property in the goods, as between the debtor and the creditor, passed. It is necessary to look a little closely at *Ex parte Joselyne* (1) to see what the Court really decided, and how far therefore, having regard to the question which it had to decide, the judgment of James L.J. (because it is only there that the difficulty is to be found) is to be read absolutely literally.

The head-note to *Ex parte Joselyne* (1) is this: "A judgment creditor, who, before the filing of a liquidation petition by his debtor, has obtained a garnishee order nisi attaching debts due to the debtor, is a secured creditor within the meaning of ss. 12 and 16 of the Bankruptcy Act, 1869, and is, therefore, entitled to the attached debts as against the trustee in the liquidation, even though they did not become actually payable until after the commencement of the liquidation." When one looks into the case one cannot help seeing that the only real questions were whether there was any difference between the order nisi and the order absolute; and, secondly, whether the fact that the attached debt had not actually become payable made any difference as to the effect of the garnishee order. Those

(1) 8 Ch. D. 327.

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were the questions the Court had to decide, as appears quite plainly from Cotton L.J.'s judgment, because he says, at p. 331, after referring to this order and after stating the question: "It is called an order nisi, but, as against the judgment debtor, it was a final and complete order, transferring at once to Patterson & Co. the right to receive any money which might be due from Kino to Watt. It was an order nisi only as against Kino, the garnishee; for, of course, he was entitled to be heard upon the question whether any money was in fact due from him to Watt, and whether he had any right to set off." Then a little lower down he goes on to say: "The right of Watt to receive the debts was entirely gone, though Kino could not be compelled to pay them until the time had arrived when he was bound to pay them." Therefore, all that Cotton L.J. points out is, that Watt, the original creditor, as Fry L.J. says in *In re Combined Weighing Machine and Advertising Co.* (1), could not receive payment of the debt. That is the real effect of the garnishee order. The expressions in the judgment of James L.J. which have been laid hold of are these, at p. 330: "The moment the order of attachment was served upon the garnishee" (that is, the order nisi) "the property in the debt due from him was absolutely transferred from the judgment debtor to the judgment creditor. The garnishee could then only pay his debt to the judgment creditor of his original debtor. The property in the debt was transferred, and there was a complete and perfect security the moment the order of attachment was served." It has been already pointed out by the Lord Chief Justice in the recent case of *Geisse* v. *Taylor* (2), at p. 663, that the judgment of James L.J. cannot be read literally, but must be taken in conjunction with that which Cotton L.J. said in the same case and with the point which James L.J. had to decide in that particular case—the question of the transfer of the property was not that which James L.J. had to consider, and he uses the phrase "the property was transferred" in connection with the sentence immediately following, by which he explains it, namely at p. 330, "The garnishee could then only pay his debt to the judgment creditor of his original debtor." It seems to me,

(1) 43 Ch. D. 99.

(2) [1905] 2 K. B. 658.

therefore, that *Ex parte Joselyne* (1) does not prevent one from holding, in accordance with *In re Combined Weighing and Advertising Machine Co.* (2), that the true effect of the garnishee order is not to transfer the debt, but to give a right to the garnishee to say to his original creditor, who has now become judgment debtor, "I am not going to pay you; I must pay the man who has obtained the garnishee order."

If that is the right and true view, then the debt, subject to that order, remains the property of the judgment debtor, and the right of the garnishor under the garnishee order nisi is subject to such rights and equities as already exist over it as the property of the debtor, including this particular debt in regard to which he has obtained a garnishee order. That that is so has been several times decided, and I need only refer to *Badeley* v. *Consolidated Bank* (3), which has been mentioned this morning, and to a summary of the law on that subject which is to be found in the judgment of Buckley J. in *In re London Pressed Hinge Co., Ld.* (4)

The rights of the garnishor, therefore, are subject to such rights and equities as affected the garnished debt in the hands of the company; and it is, now, therefore, necessary to consider what, in this case, is the right or equity to which that debt was subject, when the garnishee order nisi was obtained. That turns upon the question, What is the true effect of the debenture? The debenture is a floating security. That is not all: it is a floating security subject to the particular incidents which are expressed in the conditions, and therefore one has not to decide what is the meaning of the expression "floating security" taken by itself, but what is the meaning of "floating security" in this document. I cannot do better than take the description which Lord Macnaghten gives of the meaning of a "floating security" in the document which he had before him, in *Governments Stock and other Securities Investment Co.* v. *Manila Ry. Co.* (5), p. 86: "A floating security is an equitable charge on the assets for the time being of a going concern. It attaches

(1) 8 Ch. D. 327.
(2) 43 Ch. D. 99.
(3) 38 Ch. D. 238, at p. 257.
(4) [1905] 1 Ch. 576, at p. 581.
(5) [1897] A. C. 81.

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to the subject charged in the varying condition in which it happens to be from time to time. It is of the essence of such a charge that it remains dormant until the undertaking charged ceases to be a going concern, or until the person in whose favour the charge is created intervenes. His right to intervene may, of course, be suspended by agreement. But if there is no agreement for suspension, he may exercise his right whenever he pleases after default." Romer L.J. describes the effect of a floating security in *In re Yorkshire Woolcombers' Association, Ld.* (1), at p. 296, where he says: "Treating this as a commercial document—as it is—what was the meaning of it? Did it not contemplate that, until the trustees thought it necessary to intervene, the charge should not be perfected by notice being given to the debtors, and that the business should be carried on in the ordinary way in regard to these debts, and that a debtor might go and pay to the company a particular debt, and the company might receive it, and deal with the cash in the ordinary way in which it would be dealt with in the ordinary course of business? I think that certainly is what is contemplated by this deed; and, indeed, to hold otherwise would be to defeat, to my mind, the whole object and intent of the document, for if the trustees had been compelled or obliged to give notice to all the debtors of this company so as to perfect their security, what would have been the result? Why, the business of the company must have been stopped." Both of those judgments, the one dealing with the particular case of book debts, and the other, dealing generally with the effect of a floating security, go upon the footing that there is a charge existing at the time, capable of becoming a specific charge by certain events happening, or by certain things being done, but, before those things have happened, a charge notwithstanding. And, indeed, that that is so is the foundation of the numerous orders which are made in the Chancery Division for the appointment of a receiver for debenture-holders before the debentures become enforceable. Such orders are continually made when it is shewn that the security created by the debenture is in jeopardy. They can only be founded upon the notion that there is an existing charge.

(1) [1903] 2 Ch. 284.

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The receiver here was appointed on January 19, and it seems to me that when the receiver was appointed, his appointment operated on everything which was the property of the company at the moment of his appointment. As I have already said, this debt, though bound by the garnishee order, was still the property of the company, and therefore the receiver became entitled to receive this debt, subject to such rights as the garnishee might have. But in my judgment the garnishee had no right as against the debenture-holders, because, by virtue of the charge which existed at the date when the garnishee order had been obtained, the debenture-holders had obtained from the Court an order which gave somebody, not the garnishee, the right to receive this debt, namely, the receiver for the debenture-holders. It is said that there is authority to the contrary to be found in *Robson* v. *Smith* (1) ; but in my opinion *Robson* v. *Smith* (1) is not an authority to the contrary at all, and for this reason : I have held that the reason why the receiver becomes entitled to this debt is that the property in the debt had not been transferred to the garnishor, but remained in the company subject only to such rights as the garnishee order gave. In *Robson* v. *Smith* (1) the point that arose was a different one, because there the judgment creditor had obtained from the garnishee the payment of the debt. Nothing had been done by the debenture-holders there in order to obtain the appointment of a receiver. All that they had done was to give notice to the debtors of the company to pay the debt to them, and what Romer L.J. held was that that notice was of no effect. No receiver had been appointed, nor had anything been done to make the dormant charge under the debentures into an active charge, and the debt in question had, by payment, been discharged, and therefore, ceased to be the property of the company. That, it seems to me, is really the ratio decidendi of *Robson* v. *Smith*. (1) It does not apply to the present case at all, nor is it, in my opinion, in any way, either from the reasons given by the learned judge or his judgment, an authority which helps the judgment creditor.

Now, there is one other way in which it may be put, and in

(1) [1895] 2 Ch. 118.

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which it has been put, in argument. It is said: "It is quite true that the garnishor takes such rights as the garnishee order gives him subject to the right of the debenture-holders, but the right of the debenture-holders is not an absolute right to receive these debts, because by the debenture itself power is given to the company to deal with the debts in the ordinary course of business; and if they can deal with the debts, then, the debt having been dealt with by the judgment creditor having obtained an order on the debtor to pay to him, that comes within the power conferred by the debenture, and, therefore, the right of the debenture-holder is not absolute, but subject to that power, and has been defeated." I think it is enough to say that that argument is answered by the judgment of the late Lord Chief Justice (Lord Russell) in *Davey & Co.* v. *Williamson & Sons, Ld.* (1) The same argument was there used, and, in fact, the county court judge, from whom the case was appealed, adopted it. The Lord Chief Justice, there delivering the judgment of himself and Mathew J., says this, at p. 200: "We cannot assent to the view of the learned county court judge that a seizure under an execution on a judgment against the company is a dealing by the company in the ordinary course of business within the third condition, indorsed on the debentures, so as to be within the authority given to the company by the terms of the debentures. It is not in the ordinary course of business that the debts of a going business firm or company shall be liquidated by seizure of their assets under legal process. Nor can the transaction be properly described as a dealing by the company at all. It is a compulsory legal process directed against the company—not a dealing by them." That seems to me to answer this argument.

The result is, in my opinion, that the receiver for the debenture-holders is entitled to receive the moneys paid into Court under the judgment under the garnishee order obtained against Henry Tate & Sons, Limited, for 434*l.* It is admitted that if I am right in the case of that judgment and that garnishee order, then the case of the other judgments and of the other garnishee

(1) [1898] 2 Q. B. 194.

orders would be a fortiori. Therefore, all moneys in Court under the several orders will be paid to the receiver.

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Solicitors: *Witty & Co.; Flux, Leadbitter & Neighbour; Tarry, Sherlock & King.*

W. C. D

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Nov. 29, 30.

Landlord and Tenant—Lease by Mortgagor in Possession—Surrender of Lease to Mortgagor—Rights of Mortgagee—Conveyancing and Law of Property Act, 1881 (44 & 45 *Vict. c.* 41), *s.* 18, *sub-ss.* 1, 11.

A mortgagor in possession, who has granted a lease under the statutory power conferred on him by s. 18, sub-s. 1, of the Conveyancing Act, 1881, has no power to accept a surrender of the lease without the concurrence of his mortgagee.

Observations of Fry L.J. in *Municipal Permanent Investment Building Society* v. *Smith*, (1888) 22 Q. B. D. 70, at p. 72, applied.

THIS was an action by a mortgagee against a tenant of the mortgagor to recover arrears of rent, which raised the question whether a mortgagor in possession who has granted a lease under the statutory power conferred by s. 18 of the Conveyancing and Law of Property Act, 1881, has power also to accept a surrender of such lease without the concurrence of the mortgagee. The material facts were as follows:—

By a mortgage of September 9, 1889, one W. H. Samson, being the owner in fee of a freehold house, No. 3, Marlborough Place, St. John's Wood, mortgaged the same in the usual form to one John Robbins to secure 1800*l.* and interest.

By a lease of February 18, 1882, W. H. Samson demised No. 3, Marlborough Place to Lady Ellen Bennett for twenty-one years, at a rental of 120*l.* per annum. A counterpart of this lease was delivered to the mortgagee in accordance with sub-s. 11 of s. 18 of the Conveyancing Act, 1881.

Ever since the mortgage, W. H. Samson or his devisees had remained in possession or receipt of the rents and profits of the mortgaged premises, with the consent of John Robbins, the mortgagee, during his life, and after his death, of his executors,

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till the beginning of the year 1905, when they required the rent to be paid to them.

In November, 1892, W. H. Samson died, having made a will which was duly proved by his executors, who were also his devisees.

In August, 1902, John Robbins died, having appointed the plaintiffs his executors.

In September, 1904, Lady Ellen Bennett died, having appointed the defendant Whyte her sole executor.

By an indenture of November 25, 1904, between the defendant Whyte on the one part, and the executors and devisees of W. A. Samson of the other part, the defendant Whyte purported to surrender the premises comprised in the lease of February 18, 1882, to the executors and devisees of W. A. Samson, to the intent that the residue of the said term created by such lease might be merged and extinguished.

In February, 1905, the plaintiffs gave notice to the defendant Whyte to pay the rent reserved by the lease of February, 1882, direct to them; in reply, the defendant contended that the lease was at an end, and no rent was payable after November 25, 1904.

In April, 1905, the plaintiffs commenced the present action against the defendant Whyte, as the executor of Lady Ellen Bennett, claiming 60*l.* for arrears of rent. The action now came on for trial before Warrington J. sitting as an additional judge of the King's Bench Division.

R. Nevill, for the plaintiffs. Under s. 18, sub-s. 1, of the Conveyancing Act, 1881, a mortgagor in possession now has power to grant a lease which is binding on his mortgagee, but he has no power to accept a surrender of such lease without the concurrence of his mortgagee, in whom the legal reversion still remains vested. The surrender, to be effectual, must be made to the person who has the legal reversion: Foà's Landlord and Tenant, 3rd ed. 577. The statute gave the mortgagor a right to create a term out of the estate of his mortgagee, but the mortgagee is still to have the right of a lessor under the lease, otherwise his estate would be diminished without any compensating rights; this seems clear from the judgments in *Municipal Permanent Investment*

Building Society v. *Smith* (1), which decided that the mortgagee on going into possession can enforce the covenants and conditions in the lease in the same manner as if he had been a party to it. The mortgagor cannot re-enter for breach of any of the covenants in the lease: *Matthews* v. *Usher* (2); nor determine tenancies by notice to quit: *Miles* v. *Murphy*. (3)

A mortgagee may be quite content not to interfere so long as the property is let to a solvent tenant, who may be the mainstay of the security; and it would be a serious thing if a mortgagor could, without the consent or knowledge of his mortgagee, accept a surrender, perhaps pocketing a premium, and leave the mortgagee with a depreciated security. All that the Act does is to place leases granted by a mortgagor after the mortgage on the same footing as leases existing at the time of the mortgage.

A statutory power to grant a lease does not imply a power to accept a surrender. When it is intended that both powers shall exist, provision is generally given in express terms; e.g., in the Settled Land Act, 1882, s. 6 gives the tenant for life power to lease, and s. 13 to accept surrenders; and in the Lunacy Act, 1890, s. 120, separate provision is made for granting and surrendering leases.

The surrender, therefore, of this lease having been invalid, the lease still exists, and the defendant is accordingly still liable for the rent.

Dunham, for the defendant. If the plaintiffs' contention is correct the Conveyancing Act lays a pitfall for lessees, which cannot have been intended. Before the Act a mortgagor in possession could grant a lease which was binding as between him and his lessee by estoppel, but was not binding on the mortgagee; the mortgagor could at that time accept a surrender of the lease. Then came s. 18 of the Conveyancing Act which enabled a mortgagor to grant a lease that was binding on his mortgagee, but did not otherwise affect the position of the mortgagor and his lessee; consequently the mortgagor can, while in possession, still accept a surrender. No injustice is done to the mortgagee, because under sub-s. 11 the counterpart has to be delivered

(1) 22 Q. B. D. 70. (2) [1900] 2 Q. B. 535.
(3) (1871) Ir. Rep. 5 C. L. 383.

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to him, and he can always protect himself by going into possession or giving notice to the tenant to pay rent to him instead of to the mortgagor.

The analogy of the Settled Land Act does not apply: a tenant for life never could grant a lease except under a power either given by the settlement or by statute. The point does not seem to be covered by any of the authorities cited. In *Miles* v. *Murphy* (1), the lease was created before the mortgage. In *Matthews* v. *Usher* (2) the only question was as to the rights of a mortgagor in possession under s. 25, sub-s. 5, of the Judicature Act, 1873. *Municipal Permanent Investment Building Society* v. *Smith* (3) only decides that a mortgagee on notice to the tenant and on going into possession gets the full benefit of the lease granted by his mortgagor; it does not deal with the question of surrender. There the lease was in existence, here the lease is at an end, having been duly surrendered to the devisees of the lessor. The plaintiffs, therefore, have no right to any rent after November 25, 1904.

WARRINGTON J. The question in this case is, whether a lease granted by a mortgagor while in possession is still a subsisting lease notwithstanding the fact that the lessee has purported to surrender it, and the mortgagor's representatives have purported to accept such surrender. The facts are very simple and are not disputed. [Having stated the facts as above, the learned judge continued:—]

The lease of February, 1882, was granted under the statutory power created by s. 18, sub-s. 1 of the Conveyancing Act, 1881, which provides that a mortgagor while in possession, as against every incumbrancer may make certain leases of the mortgaged land, subject to certain provisions enumerated in the following subsection, to be inserted in such leases. Sub-sect. 11 provides that where a mortgagor makes a lease, a counterpart shall within one month be delivered to the mortgagee. One other section has some bearing on this case, and that is s. 10, which provides that the rent and benefit of the lessee's covenants are to be "annexed

(1) Ir. Rep. 5 C. L. 383. (2) [1900] 2 Q. B. 535.
(3) 22 Q. B. D. 70.

and incident to and shall go with the reversionary estate in the land or in any part thereof, immediately expectant on the term granted by the lease."

Now what is the effect of s. 18, sub-s. 1, of the Conveyancing Act, 1881, construing it by itself and applying to it certain well-known principles of law relating to the subject-matter with which it deals? After the execution of a mortgage a mortgagor, as is well known, had no estate in the land, only a right to redeem it, called an equity of redemption, the legal estate being vested in the mortgagee. Before the Conveyancing Act, 1881, the mortgagor after the execution of the mortgage had no power to grant a lease, that is to say, he had no power to carve out of the estate of his mortgagee a lease for a term of years or any other estate. If he executed a lease it operated only by way of estoppel as between himself and his lessee, and the mortgagee might at any time repudiate it, or he might elect to be bound by it, but apart from that the lease had no effect as against him. Now in this state of things, what is the meaning of s. 18, sub-s. 1, which says the mortgagor when in possession shall have power to make a lease? In my opinion the effect of this is to give the mortgagor something that he had not before, that is, a power to carve out of the estate of the mortgagee a term of years which he can grant to his lessee; or, in other words, to make the fee simple which is at the time vested in the mortgagee a reversion expectant on the determination of the term of years just created by the lease. This, in my opinion, and independently of authority, is the true view to be taken of the effect of this section; and that is the view which I should take. But I think there is authority directly relevant to the point I have to decide, that is the case of *Municipal Permanent Investment Building Society* v. *Smith*. (1) The facts of that case are entirely different from the facts of this case, but in the course of their judgments it was necessary for the members of the Appeal Court to express their opinion as to the legal effect of s. 18, sub-s. 1. I prefer to take what was said by Fry L.J. on this point, not because the result of what he says is not also contained in the judgments of the other members of the Court, but because he seems to me to put

(1) 22 Q. B. D. 70.

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the case in language which is the most useful for my purpose. At p. 72 Fry L.J. says: "The question turns on the Conveyancing Act, 1881, and the effect of s. 18 is that Davis, while in possession as mortgagor, had power to make this lease and to bind the plaintiffs. The statute in fact gives the mortgagor power to create a term out of the estate of the mortgagee, and so to convert that estate into one expectant on the term granted by the lease. That would seem to shew that it was intended that the mortgagee should have the rights of a lessor under the lease. If this were not so it would follow that the mortgagee's estate would be diminished, and he be turned into a reversioner, but without any compensating rights. I find, however, in the same section evidence confirmatory of the conclusion I have arrived at, for by sub-s. 11 it appears that the mortgagor is to deliver to the mortgagee a counterpart of the lease, which would be useless unless the latter has some rights under it."

If that view of the law, and the view I have myself expressed above, be correct, the position of matters on the granting of the lease of February, 1882, was, that a term of twenty-one years became vested in the lessee, and the reversion, which thus became a reversion expectant on this term, remained as before in the mortgagee; but the relationship of lessee and reversioner was created by virtue of the power conferred by s. 18, sub-s. 1. It is well settled that the surrender of a lease is good only if made to the person in whom the reversion expectant on the determination of that lease is vested, otherwise there will be no merger of the term. The result, therefore, is that, in my opinion, the surrender which purported to have been made on November 25, 1904, had no effect in law, and consequently that the lease is still subsisting, and the plaintiffs are accordingly entitled to the rent for which they now sue.

Solicitors: *Malkin & Co.; Hunter & Davies.*

W. C. D.

LAIRD, APPELLANT; DOBELL AND ANOTHER, RESPONDENTS. 1905 Dec. 19.

Adulteration — Fertilizers and Feeding Stuffs—False Description — Guilty Knowledge—Fertilizers and Feeding Stuffs Act, 1893 (56 & 57 *Vict. c.* 56), *s.* 3, *sub-s.* 1 (*b*).

Mens rea is not a constituent element of the offence created by s. 3, sub-s. 1 (*b*) of the Fertilizers and Feeding Stuffs Act, 1893.

CASE stated by justices.

An information was preferred by the appellant, the Chief Inspector of the Weights and Measures Department of the Cheshire County Council, stating that the respondents on or about January 12, 1905, at Minshull Vernon, in the county of Chester, did sell to one Charles Brereton Davies as food for cattle five tons of finest Galveston decorticated cotton seed cake meal, being an article manufactured in the United Kingdom or imported from abroad, and unlawfully did cause or permit an invoice or description of the same to be given to the purchaser which was false in a material particular to the prejudice of the purchaser, in that it described the articles as containing 58 per cent. of oil and albuminoids, whereas in truth and in fact the said articles only contained 51 per cent. of oil and albuminoids, and also unlawfully did abet, counsel, or procure the commission of the said offence contrary to s. 3, sub-s. 1 (*b*) of the Fertilizers and Feeding Stuffs Act, 1893. (1)

At the hearing of the information the following facts were proved: On February 2, 1905, the appellant took an average sample of decorticated cotton seed cake meal from six bags selected at Davies' farm. The sample was analysed by the County Council analyst, who certified that it contained 51 per cent. of oil and albuminoids. The meal had been purchased by

(1) Fertilizers and Feeding Stuffs Act, 1893 (56 & 57 Vict. c. 56), s. 3, sub-s. 1: "If any person who sells any article for use as a fertilizer of the soil or as food for cattle commits any of the following offences, namely:— . . . .

(*b*) Causes or permits any invoice or description of the article sold by him to be false in any material particular to the prejudice of the purchaser; . . . . he shall, without prejudice to any civil liability, be liable on summary conviction for a first offence to a fine not exceeding twenty pounds, and for any subsequent offence to a fine not exceeding fifty pounds."

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Davies from the respondents, who had given a written description of it as follows: "Finest Galveston Dect. C.S. Cake Meal at 6*l.* 7*s.* 6*d.* a ton (guaranteed 58 per cent. oil and albuminoids)."

One of the respondents gave evidence, and deposed that this meal was part of a consignment of 200 tons, and that when it arrived samples were drawn or taken by or under the direction of the respondents and forwarded to their analyst for the purpose of analysis, and that they received from him a certificate certifying that the samples so analysed contained over 60 per cent. of oil and albuminoids, and that he sold at 58 per cent. believing it to be a true statement, and that he had no idea of making an additional profit, which would be a mere trifle. He further deposed that he relied entirely upon the analysis, and had sold the meal to Davies upon such analysis.

The analyst employed by the respondents deposed that the samples analysed by him contained 60·27 per cent. of oil and albuminoids.

The justices were of opinion that the alleged offence had not been proved to have been committed by the respondents, as they considered that no evidence had been given that the respondents knowingly supplied meal not of the quality demanded, or were aware that the meal was not the quality they guaranteed, and that the remedy was a civil action by the purchaser of the meal in the county court, and they accordingly dismissed the information and summons.

The question for the Court was whether the justices came to a correct decision in point of law.

Bankes, K.C., and *Trevor Lloyd*, for the appellant. The respondents should have been convicted. The description of the article sold was false in a material particular. It is not necessary that there should be guilty knowledge in order to constitute the offence under s. 3, sub-s. 1 (*b*) of the Act: *Korten* v. *West Sussex County Council*. (1)

W. F. Taylor, K.C., and *F. E. Smith*, for the respondents. The decision of the magistrates was right. In *Korten* v. *West Sussex County Council* (1) the Court merely held that there was

(1) (1903) 72 L. J. (K.B.) 514.

evidence on which the conviction could be supported, but on the question of mens rea the Court was divided, Channell J. being of opinion that mens rea was a constituent element of the offence created by s. 3, sub-s. 1 (*b*). It is submitted that that is the right view having regard to the language of the section.

LORD ALVERSTONE C.J. This is, in my opinion, a hard case, because the respondents before sending out the description of the goods had taken steps to have the stuff analysed, and the statement made by them as to the percentage of oil and albuminoids was based on the result of the analysis, but in my opinion those facts do not in law constitute any defence to the charge under s. 3, sub-s. 1 (*b*) of the Act. In my opinion the view expressed by Wills J. and by myself in *Korten* v. *West Sussex County Council* (1) is correct, namely, that a person who causes or permits the invoice or description of the article sold to be false in any material portion—although he may have no personal knowledge of the falsity, is, nevertheless, guilty of an offence under that section. This view is to my mind supported by sub-s. 3 of s. 3, which enables a person convicted under sub-s. 1 to recover damages from his vendor and to include in the damages the amount of the fine and costs. Moreover, if it is necessary to prove guilty knowledge, I can see no distinction between the words "causes" and "permits" in sub-s. 1 (*b*). I think the object of those words was to protect the purchaser where the description of the article sold was in fact false, though not false to the knowledge of the vendor. If I am right as to the construction of the section, I cannot see that it makes any difference in law that the respondents before giving the description of the article sold had themselves caused it to be analysed. It is clear on the facts proved before the justices that the stuff sold to Davies was not in accordance with the description, and the case must, therefore, go back to the justices for them to convict.

LAWRANCE J. I am of the same opinion.

(1) 72 L. J. (K.B.) 514.

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RIDLEY J. I agree, but I am not sure how I should have decided this case but for the previous decision.

Appeal allowed.

Solicitors for appellant: *Busk, Mellor & Norris, for Cooke, Winsford.*

Solicitors for respondents: *North, Kirk & Co., Liverpool.*

F. O. R.

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[IN THE COURT OF APPEAL.]

CURRIE *v.* CONSOLIDATED KENT COLLIERIES CORPORATION, LIMITED.

Practice—Company—Voluntary Winding-up—Stay of Proceedings in Action—Denial of Liability by Liquidator—Companies Act, 1862 (25 *&* 26 *Vict. c.* 89), *ss.* 85, 87, 138—*Companies Act*, 1900 (63 *&* 64 *Vict. c.* 48), *s.* 25.

A company having gone into voluntary liquidation, an action was brought against it for money alleged to be payable to the plaintiff in respect of services rendered by him to the company. The liquidator denied any liability on the part of the company. On the liquidator's applying for a stay of proceedings in the action on the ground that the company was in liquidation:—

Held, that, the question of the company's liability being a matter which was prima facie properly determinable in the ordinary way by an action, and no special ground for a stay of proceedings being made out, the application should, in the exercise of the discretion of the Court, be refused.

APPEAL from an order made at chambers by Phillimore J. refusing to stay an action, as after mentioned.

The indorsement on the writ, as originally framed, claimed a sum of 1000*l.* as an agreed fee due to the plaintiff under an agreement in respect of services rendered to the defendant company in connection with the reorganization of the company. The company was, at the time when the action was brought, in the course of being wound up voluntarily. An application was made by the plaintiff for leave to sign judgment under Order XIV., but upon an affidavit by the liquidator denying the existence of any liability on the part of the company, and stating that he had

not been able to find any trace of any such agreement as alleged by the plaintiff in the books of the company, unconditional leave was given to defend the action. The plaintiff subsequently amended the indorsement on the writ by adding an alternative claim for the sum of 1000*l.* upon a quantum meruit. The liquidator applied on behalf of the company to a master at chambers for an order to stay proceedings in the action, on the ground that the company was being wound up voluntarily, but the master refused the application.

On appeal the judge made an order affirming the master's decision, but providing that the order should be without prejudice to any application for stay of execution after judgment.

Gore Browne, K.C., and *C. C. Scott*, for the liquidator. The question raised in this case is, what is the proper practice in such cases since the coming into effect of the Companies Act, 1900, and the Rules of 1903 made thereunder. Under the Companies Act 1862, in cases of compulsory liquidation by the Court no action against the company could be brought, or proceeded with, after the commencement of the liquidation, except with the leave of the Court: see the Companies Act, 1862, ss. 85, 87. The Act of 1862 does not provide for an automatic stay of proceedings in an action in cases of voluntary winding-up, but, in the absence of special reason to the contrary, the practice appears to have been to stay an action in such cases on the liquidator undertaking to allow the plaintiff to send in a proof in the liquidation, and, if he did not admit the claim, himself to apply to the Court under s. 138 of the Act to determine the matter as between him and the person claiming to be a creditor: see *In re Keynsham Co.* (1) The reason for the imposition of this term was that a creditor had no power himself to apply to the Court under s. 138, and it would therefore have been obviously unjust to stay his action without the imposition of such a term. By the old practice certain exceptional cases were recognized, in which the Court would not stay the action—e.g., cases of actions by mortgagees or debenture-holders—but in ordinary cases the practice appears to have been as before mentioned. Now, by

(1) (1863) 33 Beav. 123.

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s. 25 of the Companies Act, 1900, it is provided that in a voluntary winding-up an application under s. 138 of the Companies Act, 1862, may be made by any creditor of the company. A voluntary winding-up is made by that section, and the Rules of 1903 framed under the Act of 1900, precisely analogous to a compulsory winding-up for the present purpose. The person claiming to be a creditor can send in his proof, and, if it is rejected, he can apply to the Court. That being so, it is submitted that it is more convenient that creditors should prove, and that, if the claim is disputed, the matter should be determined in the liquidation, as in the case of a compulsory winding-up, than that actions by creditors should be allowed to proceed. If the former course is adopted, the creditor must give particulars of his claim, and send in vouchers to the liquidator, who may, upon receiving this information, and going into the matter, decide to admit the claim without incurring further expense. If the claim is disputed, there will be full power, if necessary, of examining and cross-examining witnesses in the Chancery Division. There are no special circumstances in the present case which afford any reason why the matter should not be dealt with in the winding-up, or why the action should be allowed to proceed.

The judge at chambers did not exercise any discretion, but proceeded merely on the ground that the plaintiff had prima facie a legal right to go on with the action. A judge in the Chancery Division would be a far better judge of the value of services rendered in connection with the reorganization of a company than a jury.

[COLLINS M.R. From the point of view suggested for the defendants, it is difficult to see why the Legislature did not in the Companies Act, 1900, extend the provisions of s. 87 of the Companies Act, 1862, to voluntary liquidations. I cannot see any reason why they stopped short of that, unless it were that they thought that prima facie a plaintiff had a right to proceed with his action.]

To provide expressly for a stay of actions in cases of voluntary winding-up would probably have involved lengthening the provisions of the Act considerably, as provision must also have been made for excepting the exceptional cases in which

it was not the existing practice for the Court to stay the action. The Act leaves the old practice untouched, by which it appears that in voluntary liquidations the liquidator got a stay of proceedings in the action on certain terms as a matter of course unless there were special reasons to the contrary. It is submitted that practically there is a presumption that the action ought to be stayed, and the onus lies on the creditor of shewing why it should not be stayed. They also cited *In re British Goldfields of West Africa.* (1)

D. M. Kerly (*Buckmaster, K.C.*, with him), for the plaintiff. The Act of 1900 and the Rules made thereunder do not appear to have altered the former practice, which seems from the cases to have been that, in the case of voluntary liquidations, if the liquidator would allow the creditor to prove for his debt, the action was stayed; but, where the liquidator denies liability in toto, there is no reason why the plaintiff should be deprived of his right of establishing his claim in the ordinary way. There is an essential difference between a compulsory winding-up and a voluntary winding-up for this purpose. In the former case the company is wound up by a liquidator appointed by, and acting as, the officer of the Court; in the latter the liquidator is merely the nominee of the company. It would not be a reasonable practice that in cases of voluntary winding-up there should, as a matter of course, be a stay of any action against the company, unless the creditor shewed special grounds for allowing it to proceed. In this case the liquidator denied liability in the proceedings under Order xiv. Why should the plaintiff be compelled to go through the idle form of sending in a proof for him to reject? Proceedings would then have to be taken by the plaintiff on the Chancery side, on affidavits, presumably, in the first instance, and then the judge might order a trial of the claim with witnesses; but, there being an action already pending, why should not the matter be determined in that action? It is very doubtful, to say the least, whether the claim would be determined more conveniently and speedily by proceedings in the liquidation than in the action. It is clearly, in any case, a matter of discretion whether the action should be stayed. The plaintiff is the

(1) [1899] 2 Ch. 7.

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"actor" in the litigation, and has prima facie a right to choose his tribunal in the matter. The Legislature has not taken away his right to proceed by action; and the fact that it has by s. 25 of the Companies Act, 1900, conferred upon him a privilege, by enabling him to apply to the Court in the matter of the liquidation, is no good reason, in the absence of special grounds shewn, for depriving him of his right to proceed by action. It is not disputed that there may be a stay of execution after judgment recovered in the action. [He cited *In re Poole Firebrick and Blue Clay Co.* (1); Palmer's Company Precedents, 9th ed., Part 2, p. 760.]

Gore Browne, K.C., in reply, referred to Lindley on Companies, 6th ed. pp. 907, 908.

COLLINS M.R. I am of opinion that no sufficient case has been made out for differing from the decision of the learned judge. It is observable that in this case we begin the discussion with the assertion on the part of the liquidator that the plaintiff has no valid claim against the company; for, upon proceedings being taken under Order XIV., it was in consequence of his disputing the existence of any claim against the company that unconditional leave to defend the action was given. It appears to me that the counsel for the liquidator sought in argument to put the case of a claim made against a company where a company is in voluntary liquidation on precisely the same footing as that of one made where a company is being compulsorily wound up, which is what the Legislature appears to have deliberately abstained from doing. Whereas in the case of a compulsory liquidation the creditor is debarred from proceeding by way of action, unless he can shew special grounds for granting him leave to do so, in the case of a voluntary liquidation the onus appears to be thrown on the liquidator of shewing that an order should be made staying an action brought against the company. One looks for some basis in principle for this distinction being made, and it would seem that it must have been because the Legislature thought that prima facie, in the case of a voluntary liquidation, the ordinary tribunal was the proper one to decide

(1) (1873) L. R. 7 Eq. 268.

upon a claim against the company. The Court had no doubt stayed the action in cases where the liquidator could shew some sufficient reason for its not being decided in the ordinary way. Where, for instance, the existence of a debt or liability was substantially admitted, though there might be some question of the exact amount due, the ordinary practice seems to have been that, liability not being really contested, but only the exact amount due, the matter was treated as one which might properly, and ought to, be determined in the liquidation. But that practice does not appear to apply to a case like the present, where there is a real dispute as to the existence of any liability. It seems to me that the learned judge at chambers was right. We have not been referred to any decision which establishes that, in the case of a voluntary liquidation, the burden is in all cases thrown on the creditor of shewing special grounds why his action should not be stayed, and the presumption appears to be prima facie in his favour.

ROMER L.J. I am of the same opinion. On an application of this kind the Court undoubtedly has a discretion, and I think that it ought to exercise that discretion, even although the judge below did not exercise any discretion. Now, what are the circumstances of this case? Is it a case in which any good would be done, or expense saved, by staying an action which has been properly brought, and in effect sending the claim to be determined in the Chancery Division? In my opinion, no advantage would be gained by so doing. This is the case of an ordinary common law action. The plaintiff alleges that he was employed by the company under some agreement, and that, either under that agreement, or upon a quantum meruit, he is entitled to a certain sum of money for services rendered by him to the company. That being the nature of the claim, what is the position taken up by the liquidator? He does not say that the plaintiff is entitled to something, and the question is merely one of amount, which might conveniently be determined by the plaintiff's putting in a proof in the liquidation. He says that he disputes the claim in toto, and does not admit that there was any agreement as alleged by the plaintiff, or that the plaintiff

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is entitled to sue for anything, or that, if he is entitled to anything, the amount claimed is correct. That being so, the whole matter is at large: witnesses will have to be called and cross-examined, and, so far as I can see, the question as to a quantum meruit may not be an easy one to determine. I should say that, presumably the case is one which ought to be tried in the King's Bench Division in the ordinary way, and not relegated to the Chancery Division. There would, I suppose, if the common law action were stayed, have to be preliminary proceedings upon affidavit, and then there would be an application to cross-examine witnesses, and ultimately a hearing in the Chancery Division, which would really be in substance, though perhaps not in form, a trial of an action. It seems to me that, under the circumstances, to stay proceedings in the action now pending would really be to throw away money and time unnecessarily.

Appeal dismissed.

Solicitors for the plaintiff: *Mayo, Elder & Co.*
Solicitors for the defendants: *Dale, Newman & Hood.*

E. L.

[IN THE COURT OF APPEAL.]

C. A. 1905 Dec. 21.

LOGAN *v.* BANK OF SCOTLAND AND OTHERS (No. 2).

Practice—Staying Action—Cause of Action arising out of Jurisdiction—Action brought Vexatiously and Oppressively—Accessible Court where Cause of Action arose.

The Court will stay an action, brought within the jurisdiction, in respect of a cause of action arising out of the jurisdiction, if satisfied that no injustice will be done thereby to the plaintiff, and that the defendant would be subject to such injustice in defending the action as would amount to vexation and oppression, to which he would not be subjected if an action were brought, in another and accessible Court, where the cause of action arose.

APPEAL from an order of Phillimore J. made at chambers.

The defendants in the action were the Bank of Scotland, Sir George Anderson, Robert Young, and James Scott. An application was made to a master at chambers, on behalf of the two first-named defendants, to stay all further proceedings in the action on the ground that it was vexatious and oppressive and an abuse of the process of the Court. The master made an order to that effect, which was reversed on appeal by the learned judge.

The plaintiff, who resided at Inverary in Scotland, brought the action to recover 50*l.* damages, for misrepresentations alleged to have been made in the prospectus of a company called James Young & Co., Limited. The company was incorporated in Scotland to take over the business of a firm of James Young & Co., and the plaintiff applied for and was allotted five 10*l.* preference shares in the company, for which he paid 50*l.* The Bank of Scotland had been the bankers of the firm, and became the bankers of the company, and their names, as bankers, appeared on the prospectus. Sir George Anderson was the treasurer of the bank. The defendants Robert Young and James Scott were directors of the company.

The head office and a large number of branches of the defendant bank were in Scotland, but they had one branch in London, at which the writ of summons in the action was served. Sir George Anderson was resident in Scotland. The defendant Scott was resident in London, and was served there, but he did

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not appear to defend the action. The defendant Young was resident in Scotland, but he also did not appear to defend. The order of the master was expressed to be made upon the undertaking of the bank and Sir George Anderson that, if judgment should be signed against the defendant Scott in this action, no objection would be taken by them, on that ground, in any proceedings in Scotland.

At the date of the action being commenced the company had gone into liquidation in Scotland, and its books and documents were in the hands of the liquidator in Edinburgh.

The Bank of Scotland and Sir George Anderson appealed.

Dec. 12, 1905. *Rufus Isaacs, K.C.* (*A. M. Bremner* and *S. C. Agnew* with him), in support of the appeal. The plaintiff is a schoolmaster in Scotland, and his claim is for damages to the extent of 50*l*. The cause of action arose in Scotland, and may involve a point, to be decided by the law of Scotland, as to the extent to which the assignation of certain contracts by the firm to the company took effect. The bank, except at their branch in London, carry on their business in Scotland, their head office being at Edinburgh. The other defendants, with the exception of Scott, are resident in Scotland, and he is an undischarged bankrupt and does not defend the action. The suggestion that the action must be brought here in order that he may be interrogated is a mere pretence. It would be a very serious thing to bring the officials and books of the bank, the witnesses, and the books in the hands of the liquidator, to England; and, indeed, as to these, there might be a difficulty about production. The whole circumstances of the case point to this—that the object of bringing an action here instead of in Edinburgh was to make the defence of the action so serious and difficult a matter that the bank would be obliged to settle the case. The action is therefore vexatious and an abuse of the process of the Court; and there being a Court which is accessible to the plaintiff, it would inflict no injustice on him to leave him to his remedy in Scotland, while to allow the action to continue here would work an injustice on the defendant bank. The jurisdiction of this Court to try a transitory action of this kind is unquestionable, but the

Court has a discretion in the matter and not an obligation. The right of the Court to protect its procedure from abuse has been recognized in a great number of cases and under different circumstances: *Stein* v. *Walkenhuysen* (1), *McHenry* v. *Lewis* (2), *Metropolitan Bank* v. *Pooley* (3), *Lawrance* v. *Norreys* (4), *Haggard* v. *Pelicier Frères.* (5) In Scotland the Courts admit a plea of forum non conveniens (*Longworth* v. *Hope* (6), *Williamson* v. *North Eastern Ry. Co.* (7)); and the decisions that an English Court will not deal with suits that relate to title to land abroad (*British South Africa Co.* v. *Companhia de Moçambique* (8)), or to trusts under which a mine in Scotland was carried on (*Cookney* v. *Anderson* (9), which on this point was not affected by *Drummond* v. *Drummond* (10)), turned on the inconvenience of exercising such a jurisdiction, which would not promote the ends of justice. The present application is not based on the ground of inconvenience; but the extent of the inconvenience to which the defendants would be put in defending this action in London, taking into consideration all the circumstances, shews that there has been an abuse of the process of the Court. It may be noted that the American Courts exercise a jurisdiction to stay actions brought in one State which could be brought in another State in which the parties reside: *Collard* v. *Beach.* (11)

R. F. Colam, for the plaintiff. The power of the Court to stay an action as frivolous and vexatious is not disputed; but that is not applicable to this cause of action, which is not in itself either frivolous or vexatious. The case for the defendants is really that, because an action could be more cheaply tried in Scotland, the Court ought to stay this action. In numberless cases foreigners have sued foreigners in these Courts, but the objection of expense does not appear to have ever succeeded in producing a stay of an action. In the present case a plaintiff, competent to sue here, with what may turn out to be a good cause

(1) (1858) E. B. & E. 65.
(2) (1882) 22 Ch. D. 397.
(3) (1885) 10 App. Cas. 210.
(4) (1890) 15 App. Cas. 210.
(5) [1892] A. C. 61.
(6) (1865) 3 M. 1049.
(7) (1884) 11 R. 596.
(8) [1893] A. C. 602.
(9) (1862) 31 Beav. 452.
(10) (1866) L. R. 2 Ch. 32.
(11) (1903) 81 Hun, App. Div. N. Y. 582; (1904) 93 Hun, App. Div. N. Y. 339.

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of action, has brought an action in a Court competent to try it, since two of the defendants—the bank and Scott—are resident here. This is not a case in which considerations of convenience of venue are involved, for they can only arise as to choice of places within the jurisdiction. The cases cited for the defendants turned upon various considerations, such as the non-existence of a cause of action; that the action was against some one who could not be sued; or that, as in *McHenry* v. *Lewis* (1), the plaintiff had already started proceedings in a foreign country, and that the circumstances rendered the action in these Courts oppressive. The last-mentioned case was followed in *Peruvian Guano Co.* v. *Bockwoldt* (2), in which Jessel M.R. speaks of the right of the plaintiff to bring the action, and asks why, if there are substantial reasons to induce him to bring two actions, he should be deprived of that right. Here the plaintiff is only bringing one action, and he has given substantial reasons for bringing it here. In view of the decisions that have been cited, it cannot be said that mere balance of convenience is enough to entitle the Court to stay the action, for if it were enough there would have been no need to raise any other argument, or to decide the cases on any other ground. In *Thornton* v. *Thornton* (3), where there was an action by a husband in India, and a later action by a wife in England, the Court of Appeal disregarded the inconvenience and expense to which the husband would be put if both actions were allowed to go on, and refused to stay the wife's action. Where there are two actions, one in a foreign country and the other in an English Court, the burden of proof that the latter is vexatious is on the defendant: *Hyman* v. *Helm.* (4) A fortiori where, as in this case, no foreign action has been commenced or is contemplated, the defendants would be bound to shew that the existing action is oppressive, but the defendants in this case have failed to shew anything but a balance of convenience, as against the advantages that the plaintiff claims will arise to him if his action is tried here rather than in Scotland.

Rufus Isaacs, K.C., in reply.

Cur. adv. vult.

(1) 22 Ch. D. 397.
(2) (1882) 23 Ch. D. 225
(3) (1886) 11 P. D. 176.
(4) (1883) 24 Ch. D. 531.

Dec. 21, 1905. SIR GORELL BARNES, PRESIDENT read the following judgment: — This is an appeal from an order of Phillimore J. made on November 6 last, rescinding an order of Master Macdonell made in this action on October 31 last staying all proceedings in the action against the defendant bank and Sir George Anderson, on the ground that the same is vexatious and oppressive and an abuse of the process of the Court.

The action is brought against the defendant bank and Sir George Anderson as treasurer of the bank, and Robert Young and James Scott, in respect of certain alleged misrepresentations in a prospectus of a Scottish company, issued on March 1, 1899, on which the name of the defendant bank appeared as the company's bankers. The bank and Sir George Anderson say that they took no part in the promotion of the company, and were not in any way concerned in the preparation or issue of the prospectus except that the bank acted as the bankers of the company, and that they had no reason to believe, and did not, and do not now, believe that the prospectus contained any false or misleading statement.

The action is purely a Scottish action, and all the transactions which give rise to the alleged cause of action took place exclusively in Scotland; all the parties to the action reside in Scotland, with the exception of the defendant Scott, who appears to reside in London.

The plaintiff is a schoolmaster, who resides at Inverary, in Argyllshire, and is a domiciled Scotsman. The bank is a Scottish corporation incorporated under an Act of Parliament in Scotland in the year 1695, and they have their head office in Edinburgh and numerous branches at various places in Scotland. The only branch of the bank outside Scotland is in London, and the writ of summons in this action was served on the bank there. But the London branch appears to have taken no part and was not concerned in any of the matters in question in this action. Sir George Anderson resides in Scotland and is a domiciled Scotsman. He states that he has appeared without objecting to the jurisdiction of the Court because of his official connection with the bank. The defendant Young, who appears to reside in

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Scotland and to be a Scotsman, was made bankrupt in the Court of Session in Scotland about August 11, 1899, but appears to have obtained his discharge in March, 1904, and to have been again made bankrupt in the said Court about May 16, 1905, and is still undischarged. He has not entered an appearance in this action. The defendant Scott was adjudicated bankrupt in the London Bankruptcy Court on or about June 14, 1902. His discharge was subsequently suspended for two years from November 19, 1902, and he is still undischarged, and it appears to be clear that he is not a substantial defendant in this action. He appears to have been appointed a director of James Young & Sons, Limited, as representing the interests of a sister, who was the widow of James Young, a former partner in the firm of James Young & Sons, who was resident in Scotland, but he seems now to be a clerk in some office in the City. He has not appeared to the action.

The cause of action alleged in the statement of claim appears to arise out of the fact that the plaintiff, as he alleges, in March, 1899, applied for and was allotted five preference shares of 10*l.* each in a company registered in Scotland, called James Young & Sons, Limited. That application was made and was received in Scotland.

It is clear from the affidavits in this case that all the circumstances upon which the plaintiff relies in the statement of claim took place in Scotland and not elsewhere, and that all the evidence with reference thereto will have to be obtained from Scotland.

The company was registered in Scotland in the early part of 1899, having been formed to acquire, as it afterwards did, the business of a Scottish firm of contractors, Messrs. James Young & Sons, Edinburgh. The business of that firm was carried on exclusively in Scotland, and, as appears from the prospectus of the company, the whole of the assets acquired from the firm were situated in Scotland, and all contracts to be taken over by them were for works to be executed in Scotland. The firm had been for many years customers of the defendant bank, and the banking accounts of the firm, and afterwards of the company, were kept at the head office of the bank in Edinburgh. The

company went into voluntary liquidation in September, 1899, and an order was made directing the company to be wound up under the supervision of the Court on October 25, 1899. All the books and documents of the company are in the hands of the liquidator in Edinburgh. If this action be fought out, it is obvious that it will involve calling a large number of witnesses, all of whom reside in Scotland, and none in England, and the production of numerous books, documents, and papers relating to the matters in question in Scotland, about the production of which there might be considerable difficulty having regard to what is stated in the affidavit of Sir George Anderson, and also probably a consideration of Scottish law as affecting the rights and liabilities of the respective parties, and it is perfectly clear that a case of this kind ought, if possible, to be tried in Scotland, and that the inconvenience and difficulty placed upon the defendants in conducting the case in England would be so great as to put a great oppression upon them if they were obliged to produce and keep their witnesses and documents, &c., in London during the time such a trial as that which would take place would last. In fact, the inconvenience would be so great and the expenses so heavy as to be utterly out of proportion to the insignificant sum involved in this action.

The action appears to be brought by the plaintiff alone nearly five years after the winding-up order, and, although it is suggested in the affidavit of Mr. Campbell, the plaintiff's solicitor, that he is law agent for a large number of shareholders in James Young & Sons, Limited, he does not venture to suggest that any one of these shareholders is assisting the plaintiff in this action or ready to be bound by its results, or that in any way the present is a test action brought on behalf of a number of shareholders.

The defendants make this motion practically upon the grounds stated in Sir George Anderson's affidavit, where he urges that no legitimate advantage can accrue to the plaintiff from prosecuting this action in England while there is an appropriate tribunal in Scotland, and that he believes that the plaintiff has not brought the action in England bona fide for the purpose of obtaining justice, but vexatiously and solely for the purpose of

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harassing the defendant bank under cover of asking justice, and in the hope that the bank, rather than incur the trouble and expense of trying the action in England, may be induced to pay something in order to get rid of an unfounded claim. This suggestion is denied by the plaintiff, who, according to his affidavit, puts forward this suggestion, that the defendant Scott is in England, and that the plaintiff desires to have the matters in dispute settled in one action in England, where he can make Scott and the other defendants all parties, and that Scott is not a mere nominal defendant. With regard to this last point it is to be noticed that Scott is, as I have already observed, an undischarged bankrupt and has not appeared, and has stated that he does not intend to deliver any defence in the action although the statement of claim has been delivered to him, and the bank say that Scott is not a substantial defendant at all.

Now first, with regard to the law applicable to the case, there seems, after the discussion of the case in Court by counsel, to be substantially little dispute between them as to the state of the law in this country. An American and certain Scottish cases were cited which seem to carry the law further in those countries than can be found in any reported case in this country. In the first of those cases, *Collard* v. *Beach* (1), where an action had been brought in the State of New York, by a resident of the State of Connecticut against another resident of that State, the Court declined to exercise its jurisdiction and to try the case unless there were special circumstances shewn. The Court appears principally to have decided the case upon the ground that the Court will not allow its time to be taken up with the burden and expense of trying actions in that Court which ought to be brought in other jurisdictions where the home Courts of the litigants were open; in other words, they appear to have declined jurisdiction because of the inconvenience to an already overworked Court which the case would cause.

In the Scottish cases of *Longworth* v. *Hope* (2) and *Williamson* v. *North Eastern Ry. Co.* (3) it is stated that the Courts in Scotland will allow the plea of forum non conveniens, and at

(1) 81 Hun, App. Div. N. Y. 582; 93 Hun, App. Div. N. Y. 389.

(2) 3 M. 1049.

(3) 11 R. 596.

first sight those cases seem to suggest that a mere question of inconvenience would be sufficient to cause the Court in Scotland to decline to exercise its jurisdiction, but, having regard to the judgment of Lord Deas in the first of those cases, it would seem that the inconvenience which the Courts would consider would be an inconvenience which would give the party endeavouring to avail himself of the Court's jurisdiction an unfair advantage over his opponent; for he says: "It is a valuable discretion, which is vested in every Court, not to exercise its jurisdiction if there are grounds for holding that, by an exercise of that jurisdiction, the defender, who objects to it, will be put to an unfair disadvantage which he would not be subjected to in another accessible and competent Court," and I should gather that the Scottish Courts would scarcely object to allow a case to be tried unless they felt satisfied that injustice would be done by allowing it to proceed in their own Court.

In some cases in England the doctrine of forum conveniens is to be met with, as in cases of administration of estates and trusts, of which an instance is to be found in the case of *Ewing* v. *Orr Ewing* (1); but in that case I notice Lord Selborne stated that "It appears also that the doctrine of forum conveniens, which in England seldom comes into consideration when jurisdiction exists apart from service of process abroad, unless there is an actual competition of suits, is in Scotland carried further, and may prevent the exercise of jurisdiction when the Court is satisfied that the suit might have been brought and effectively prosecuted in a more convenient forum, although this may not actually have been done." These remarks were made in a case which is of a class in which it may be necessary to invoke the above doctrine, but no case was cited to this Court in which that doctrine has been held to apply to actions of a transitory character such as that in the present case. It may, however, be that there is not really any very substantial difference between the practice in Scotland and that of our Courts as expressed by various judges—viz., that the Court will interfere to prevent vexatious proceedings which would have the effect of preventing the due administration of justice; thus Lord Bowen in

(1) (1885) 10 App. Cas. 453, at p. 506.

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McHenry v. *Lewis* (1) spoke of "The general principle that the Court can and will interfere whenever there is vexation and oppression to prevent the administration of justice being perverted for an unjust end." For instance, in this country, where two actions are brought by the same person against the same person in different Courts governed by the same procedure, and where the judgments are followed by the same remedies, it is prima facie vexatious to bring two actions where one will lie; and, where two actions are brought, one in this country and one in a foreign country, by the same plaintiff against the same defendant, the bringing of such two actions may be vexatious, though not necessarily so, and other cases may be put, for which see the judgments in *McHenry* v. *Lewis* (1) and *Hyman* v. *Helm.* (2)

In my opinion, however, the jurisdiction of the Court to stay proceedings on the ground of vexation should be exercised with great care; indeed, I find that Cotton L.J. in *McHenry* v. *Lewis*, at p. 406 of the report, said: "In the first place, it is a jurisdiction which one ought to exercise with extreme caution. Stopping in the middle of a suit a plaintiff from going on, when he has a right of action as against the defendant, is a jurisdiction which has to be exercised with very considerable caution."

The English Courts are freely open to persons foreign to this country seeking to enforce their rights against our corporations, companies and citizens, in cases in which the Courts can properly exercise jurisdiction, but, while I think we ought to be careful not to check this freedom, I am of opinion that we ought not to allow this hospitality to be abused. The difficulties which arise in the exercise of this power of the Court do not appear to be so much difficulties in stating the law as difficulties in administering or applying it. The Court should, on the one hand, see clearly that in stopping an action it does not do injustice, and, on the other hand, I think the Court ought to interfere whenever there is such vexation and oppression that the defendant who objects to the exercise of the jurisdiction would be subjected to such injustice that he ought not to be sued in the Court in which the action is brought, to which injustice he would not be subjected if the action were brought in another accessible and competent Court.

(1) 22 Ch. D. 397, at p. 408. (2) 24 Ch. D. 531.

There are various grounds on which an action may be vexatious. It may be so frivolous that it is obvious that it cannot succeed, and it will be stayed. The facts then shew that it is only brought to annoy the defendant, and, in my view, this would not necessarily be answered by the plaintiff stating that he bona fide believed in his rights, because he might be possessed of a mind which held a distorted view about the matter such as no reasonable man ought to entertain. In other words, it does not appear to me that the question ought to be settled by a mere consideration of what the plaintiff considers his intention, but the Court is at liberty to treat him as intending what his acts shew.

Again, as Sir George Jessel points out in *Peruvian Guano Co.* v. *Bockwoldt* (1): "The plaintiff not intending to annoy or harass the defendant, but thinking that he would get some fanciful advantage, sues him in two Courts at the same time under the same jurisdiction. . . . . That is vexatious, because whatever the intention of the plaintiff may be he cannot get any benefit in that way and the defendant is harassed by two suits." The case may also be the same, though not necessarily so, where one suit is brought in one country and a second in another by the same plaintiff against the same defendant. There may also be other cases, but all the cases appear to be covered by Lord Bowen's language in the case last mentioned where he says: "Therefore, when that which he"—the plaintiff—"is asking for is frivolous, or sometimes when he is asking for it in a way which necessarily involves injustice, the Courts have interfered."

Now, it is true that the Courts of this country have not gone so far as to express themselves upon the question of convenience in terms similar to those used in the Scotch cases, though, as I have already noticed, it may be doubted whether there is any substantial difference between the two. Yet it seems to me clear that the inconvenience of trying a case in a particular tribunal may be such as practically to work a serious injustice upon a defendant and be vexatious. This would probably not be so if the difference of trying in one country rather than in another were merely measured by some extra expense; but where the difficulty for the defendant of trying in the country in which

(1) 23 Ch. D. 225, at p. 230.

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the action is brought is such that it is impracticable to properly try the case by reason of the difficulty of procuring the attendance of busy men as witnesses, and keeping them during a long trial, and of having to deal with masses of books, documents, and papers which are not in the country where the action is brought, and of dealing with law foreign to the tribunal, it appears to me that a case of vexation in some circumstances may be made out if the plaintiff chooses to sue in that country rather than in that where everybody is and where all the witnesses and material for the trial are. If, for instance, as was put in argument, a dispute of a complicated character had arisen between two foreigners in a foreign country, and one of them were made defendant in an action in this country by serving him with a writ while he happened to be here for a few days' visit, I apprehend that, although there would be jurisdiction in the Court to entertain the suit, it would have little hesitation in treating the action as vexatious and staying it. Suppose, again, for instance, that this action had been brought against all the present defendants except Scott, and the bank had been served in this country, which it could be, as it has been in the present case, because it has a branch here, could there be any reasonable doubt but that the plaintiff must be treated as intending to bring a vexatious action and that such action would be stayed? If that were not held, I see no reason why any one abroad might not sue and be allowed to proceed, against a bank which had a branch in this country, in respect of transactions all of which had taken place in some other country where the head office of the bank was—*e.g.*, Australia or Brazil—and where the inconvenience of trying the case in this country would be so enormous as practically to work the most serious injustice upon the defendant. This matter is, in this respect, of general importance, because so many banks and other mercantile houses which are established in our Colonies and in the United States and other foreign countries have branches here. To a business concern to allow actions to proceed in such circumstances when there is a proper and adequate tribunal in the place where both parties really are, and dealt with each other, and all the evidence is, would be intolerable. In the present case, apart from this question about

Scott, it is difficult to conceive anything more harassing to the defendant bank than to have their officials dragged up to London for a lengthy trial, when the Court of Session is, so to speak, across the way in Edinburgh, and when together with their officials they would have to bring up here, and keep away from their business, numerous other witnesses with a mass of books, papers and documents, if they can get them at all, which there seems to be some difficulty about without orders from the Court of Session as to some of them. All this to my mind is not measured by mere expense, and even on the question of expense it is to be pointed out that the cost of trying a case such as that indicated by the statement of claim, which refers to very complicated matters and attacks the character of the bank and Sir George Anderson, is utterly out of proportion to the trumpery amount in dispute; and if the defendants win, one would gather that they would have little prospect of recovering their costs from the plaintiff.

The question then seems to me to resolve itself into this, viz., whether the fact that Scott has been made a defendant and has been served in England makes any difference in the view which the Court should take of the case. To my mind it does not, having regard to the special circumstances of the case. Of course, it might do so if Scott were a real defendant and it had been necessary to bring one action to join him and the bank in this country; then the bank might have had to submit. But Sir George Anderson's affidavit describes Scott's position, and the affidavits of the plaintiff and his solicitor do not contain one word to shew that Scott was not known to the plaintiff to be an uncertificated bankrupt. Scott is not defending, and could not apparently find any means for doing so. Was he then joined because the plaintiff wished to enforce his remedies against him? I feel it impossible to take this view, and, notwithstanding what the plaintiff and his solicitor say in their affidavits, I cannot bring myself to find that in fact the action is bona fide brought in this country.

One other point: it is said by the plaintiff that a judgment against Scott might bar the plaintiff's remedy against the bank, but Mr. Dalziel, the bank's law agent, says that this is not so in

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Scotland, and, although this is disputed by the plaintiff's solicitor, I prefer to accept Mr. Dalziel's view of the law. He is a writer to the signet of thirty-nine years' standing; the plaintiff's solicitor does not appear to possess the same extensive experience. But if there be any doubt on the matter, the point is dealt with by the master's order under which the bank and Sir George Anderson are not to raise any point out of this. Moreover, there is no need for the plaintiff to sign judgment against Scott, and it seems clear he will get nothing if he does. It is further said by the plaintiff that he wishes to get discovery against Scott; but as Scott is not defending, I fail to see how the plaintiff can expect to get any discovery against him which would in any way affect the case.

For these reasons, I think that this appeal should be allowed with costs here and below, the master's order restored subject to a slight correction, and the plaintiff left to pursue his remedies against the bank and Sir George Anderson on the other side of the Tweed amid his own countrymen. This involves no hardship upon the plaintiff, but is really to his advantage if his claim is persisted in and fought out; for he can make it at less expense and trouble to himself in Scotland than in England. I think the restored order of the master should be slightly varied by the stay being of the proceedings against the defendant bank and the defendant Sir George Anderson.

COLLINS M.R. Romer L.J. and I have read the judgment which has just been delivered, and we agree with it.

Appeal allowed.

Solicitor for the plaintiff: *D. W. Drummond.*

Solicitors for the defendants: *Ashurst, Morris, Crisp & Co.*

A. M.

WILLIAMS *v.* GABRIEL AND OTHERS.

1905
Nov. 6;
Dec. 21.

Landlord and Tenant—Lease—Covenant for Quiet Enjoyment—Assignment of Reversion—Breach of Covenant—Interruption by Assignee.

In 1886 a lease for twenty-one years was granted to the plaintiff of certain rooms on the ground and first floors of a block of buildings, the whole of which belonged to the lessor. The lease contained a covenant for quiet enjoyment of the rooms demised to the plaintiff "without any interruption or disturbance" by the lessor "or any person claiming under him." In 1891 the lessor assigned his reversion in the whole of the buildings. In 1904 the buildings, other than the part demised to the plaintiff, became so dilapidated that an order was made, under the London Building Acts, for their demolition. The assignees of the reversion in carrying out the work of demolition caused an interruption of the enjoyment of the plaintiff's premises. The lessor being dead, the plaintiff sued his representatives to recover damages for breach of his covenant for quiet enjoyment:—

Held, that the assignees of the reversion could not claim under the lessor a right to do the acts which caused the interruption, and that the representatives of the lessor were, therefore, not liable.

ACTION tried by Bray J. without a jury.

The plaintiff claimed damages for breach of a covenant for quiet enjoyment. The defendants were the executors and executrix of Arnold Gabriel, deceased.

The facts as stated by the learned judge in his considered judgment were as follows: "On October 19, 1886, Arnold Gabriel demised to the plaintiff a shop and kitchen on the ground floor of a building known as Aberdeen Buildings in Emmett Street, Limehouse, and four rooms on the first floor above the shop and kitchen, and portion of a yard adjoining the premises, to be occupied for the purpose of a coffee-house. The lease was for twenty-one years determinable by the lessee at the end of the seventh or fourteenth years, and the rent was 40*l*. The only material covenant by the lessor was the covenant for quiet enjoyment, which was in these terms: 'And the lessor for himself, his heirs, executors, administrators and assigns doth hereby covenant with the lessee that the lessee paying the rent hereinbefore reserved and performing and observing the covenants on his part hereinbefore contained shall and may

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peaceably enjoy the demised premises during the said term without any interruption or disturbance by the lessor or any person claiming under him.' Aberdeen Buildings was a block of buildings recently built, intended to be let out in flats or tenements, and there were several floors above the premises demised to the plaintiff. About the year 1891 Gabriel assigned his reversion in the whole of the buildings to Jackson. There was no evidence that at this time the buildings were out of repair. Some considerable time before 1904 the buildings, other than those occupied by the plaintiff, got very much out of repair; all the tenants other than the plaintiff left, and the plaintiff's rooms became injured by wet. In 1904 Aberdeen Buildings got so dilapidated that proceedings were taken against the owners by the London County Council under the London Buildings Acts which resulted in the order of March 25, 1904, by which the owners of Aberdeen Buildings were ordered to take down the structure on the ground that it was so far dilapidated as to have become and to be unfit for use or occupation. At this time the reversion was vested in Messrs. Attenborough as mortgagees, a Mr. Hargreave being the mortgagor. On July 4 these gentlemen commenced to pull down the buildings, after a time completely exposing part of the plaintiff's premises, and the plaintiff was forced by these operations to leave in May, 1905. The plaintiff alleged that this was an interruption of his quiet enjoyment for which the representatives of the original lessor were liable. There was no doubt that the plaintiff had suffered considerable damage, but the defendants denied liability in toto."

Morle, for the plaintiff.

English Harrison, K.C., and *J. T. Tanner*, for the defendants.

[In addition to the cases mentioned in the judgment, *Miller* v. *Hancock* (1), *Hayes* v. *Bickerstaff* (2), and Platt on Leases, 8th ed. vol. 2, p. 312, were referred to.]

Cur. adv. vult.

Dec. 21. BRAY J. read the following judgment:—In this action the plaintiff sued the defendants as the representatives of Arnold Gabriel, deceased, for damages for breach of a covenant

(1) [1893] 2 Q. B. 177.

(2) (1669) Vaugh. 118.

for quiet enjoyment. The statement of claim contained an alternative claim for trespass, nuisance, and negligence, but at the trial counsel for the plaintiff rested his case, as he was bound to do, on breach of covenant. The facts were as follows. [The learned judge stated the facts as set out above, and continued :—] I have now to construe the covenant for quiet enjoyment. This form of covenant has been under the consideration of the Court in several cases and has received judicial interpretation from several judges. The most important of these cases is *Harrison, Ainslie & Co.* v. *Muncaster.* (1) In that case the defendant had let a mine to the plaintiffs with a covenant for quiet enjoyment, and subsequently let the adjoining mine to a tenant, who in the course of ordinary and proper working of the adjoining mine struck a feeder, with the result that a large body of underground water flooded that mine and the plaintiffs' mine ; and the plaintiffs claimed that the quiet enjoyment of their mine had been interrupted, and that the defendant, their lessor, was responsible. The first question that arose was whether there had been an interruption, and Lord Esher says (2) : " The case of *Sanderson* v. *Mayor of Berwick-on-Tweed* (3) is a clear authority that the interruption contemplated by the covenant need not necessarily be an interference with the title, but may extend to an interference with the enjoyment; and that decision, interpreted in that way, was, in my opinion, authorized by the case of *Shaw* v. *Stenton.*" (4) He then proceeded to hold that on the facts of that case there had been an interruption. In my opinion I must hold that there has been an interruption here, and, indeed, this point was not seriously contested ; but the interruption was by Messrs. Attenborough, the assignees of the reversion. I have to consider whether it was an interruption by any person claiming under the lessor. The word " lawfully " is not in the covenant, but I do not think its omission is of any importance. The words " any person claiming under the lessor " were interpreted by Lord Esher to mean a person claiming under him (i.e., the lessor) the right to do the acts which caused the interruption. The other Lords

(1) [1891] 2 Q. B. 680.
(2) [1891] 2 Q. B. at p. 684.
(3) (1884) 13 Q. B. D. 547.
(4) (1858) 2 H. & N. 858.

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Justices do not use the same words, but I see nothing in their judgments to shew that they differed from Lord Esher. It may perhaps be only a dictum, as the Court of Appeal in that case held that the defendant was not liable on grounds which do not apply here; but whether this be so or not, or whether I am bound by this decision or not, Lord Esher's interpretation is in my opinion the correct one. If it were not so the lessor would be responsible for all interruptions by any person claiming title through him whether assignee or under-tenant, and however wilful or negligent the interruption was. There must be some limit, and I think the limit suggested by Lord Esher is the right one. It comes to this, that the lessor agrees to become bound for any act of interruption by himself or by any person whom he has expressly or impliedly authorized to do the acts. If the lessor parts with the property or with adjoining property to a person, and that person is in a position to rightfully claim under his title from the lessor that he is authorized to do those acts, the lessor will be responsible. This is reasonable and is what the parties might well have contemplated, because the lessor has really authorized the acts to be done; but to hold that the parties contemplated that the lessor was to be responsible for wrongful or negligent acts which he had not authorized would, in my judgment, be beyond reason.

I was referred to a number of other authorities, and I must notice some of them. In *Davies* v. *Town Properties Investment Corporation* (1) Byrne J. cites and agrees with and acts upon Lord Esher's construction of the covenant. In *Jenkins* v. *Jackson* (2) Kekewich J. holds the landlords responsible for noise and vibration caused by dancing, on the ground that the landlord had authorized his tenant to use the rooms for dancing after he had had repeated notice that the dancing caused a nuisance. That would be right on Lord Esher's definition. In *Sanderson* v. *Mayor of Berwick-on-Tweed* (3) Fry L.J., giving the judgment of the Court of Appeal, held a lessor responsible because his tenant of adjoining land had in the proper and contemplated use of certain drains damaged the plaintiff, but

(1) [1902] 2 Ch. 635, at p. 641. (2) (1888) 40 Ch. D. 71.
(3) 13 Q. B. D. 547.

refused to hold the lessor responsible for excessive user of those drains. There is nothing in the judgments in *Anderson* v. *Oppenheimer* (1) to the contrary. The lessor had put up the cistern, and if it had been improperly constructed it would be right that he should be responsible. In *Shaw* v. *Stenton* (2) the excavation which caused the damage had been done by the defendant himself. If Lord Esher's construction be the right one, as I think it is, I have no difficulty in holding on the facts here that Messrs. Attenborough could not claim under the lessor, Arnold Gabriel, the right to do the acts complained of, and, therefore, that his representatives were not liable for what Messrs. Attenborough did. There must be judgment for the defendants with costs, including the costs of and occasioned by the adjournment.

Judgment for defendants.

Solicitor for plaintiff: *Joseph Sykes.*
Solicitors for defendants: *W. W. Wynne & Sons.*

(1) (1880) 5 Q. B. D. 602. (2) 2 H. & N. 858.

F. O. R.

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EVANS *v.* MAYOR, &c., OF LIVERPOOL.

Public Health—Infectious Hospital—Discharge of Patient while still Infectious—Liability of Local Authority—Public Health Act, 1875 (38 & 39 *Vict. c.* 55), *ss.* 124, 131, 132.

The defendants, a local authority, acting under the provisions of the Public Health Act, 1875, provided for the use of the inhabitants of their district a hospital for the reception of persons suffering from infectious diseases. A visiting physician, who was a competent medical practitioner, was appointed to the hospital, and acted under the general directions of the hospitals committee of the defendants, the rules providing (inter alia) that he should be responsible for "the treatment of the patients from the beginning to the end of their stay, and also for their freedom from infection when discharged." A son of the plaintiff was treated in the hospital while suffering from a mild attack of scarlet fever, and was ultimately discharged by the visiting physician while still in an infectious condition, and under circumstances which a jury found to amount to a want of reasonable skill and care on his part in and about the discharge; after the boy had returned home, he communicated the disease to three other children of the plaintiff. The plaintiff then sued the defendants to recover the expense to which he had been put in regard to the illness of his other children owing to the premature discharge of his son from the hospital by the visiting physician:—

Held, that the plaintiff was not entitled to recover, for the legal obligation of the defendants extended only to the provision of reasonably skilled and competent medical attendance for the patients, which they had discharged, and that there was no absolute undertaking or obligation on their part that no patient should be discharged by the visiting physician while still in a condition which might cause infection.

Further consideration before Walton J. of an action tried at Liverpool.

The following statement of facts is in substance taken from the judgment.

The plaintiff was the father of a boy six years old who had an attack of scarlet fever. The defendants, the Corporation of Liverpool, have a fever hospital, provided by them under s. 131 of the Public Health Act, 1875, in which cases are treated while in an acute stage; they have also a convalescent home or hospital, to which patients are removed when the more acute stages of the fever have passed. When the doctor who attended

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the plaintiff's son found that he had scarlet fever, he notified the fact in accordance with his statutory duty under the Infectious Disease (Notification) Act, 1889, to the medical officer of health; in the notification certain questions were printed, the answers to which had to be filled in by the doctor; in the present case the doctor's answers were that the patient was not properly isolated, that removal to hospital was required, and that the patient was fit for removal. The notification was sent in, and the child was duly removed to the hospital in the hospital ambulance; the plaintiff raised no objection to the removal. At the hospital the boy was treated for some time, and while there he passed through a mild and very ordinary attack of scarlet fever. About November 22 he was removed from the fever hospital to the convalescent home, where he remained until December 23. On December 22 the matron at the convalescent home sent a notice to the plaintiff that the child was discharged, and requested his parents to fetch him on the following morning, and he was taken away from the hospital at the time appointed. Within a few days one of his brothers developed scarlet fever, and shortly afterwards two others developed the disease; the result being that the plaintiff was put to expense amounting to 55*l.*, and this action was brought to recover that expense to which the plaintiff had been put, on the ground that the child had been improperly discharged from the convalescent hospital. The plaintiff's case was that Dr. Archer, the medical officer at the convalescent home, who held the post of visiting physician, had been guilty of negligence in giving instructions under the rules for the boy's discharge, and also that the matron and nurses had failed to examine him properly and carefully and to report his condition fully and accurately to Dr. Archer before he examined him for discharge.

At the trial at the Liverpool Assizes the jury found, in answer to specific questions put to them by the learned judge—(1.) that there was a want of reasonable skill or care on the part of Dr. Archer in or about the discharge of the boy; (2.) that in consequence of such want of skill or care the plaintiff suffered the damage complained of; (3.) that there was no negligence on the part of the matron or nurses in examining or reporting

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on the condition of the boy with a view to his discharge; (4.) that it was not in consequence of any such last-mentioned negligence that the plaintiff suffered the damage; and (5.) that there was an undertaking by the defendants with the plaintiff that their visiting physician should act with reasonable care and skill in and about the discharge of the boy from the hospital.

The resolution of the city council appointing Dr. Archer to the post of visiting physician provided that the engagement should be subject to the following conditions: "That Dr. Archer be responsible for the medical treatment of the patients, and that he visit the Priory Road Hospital every day if requisite; that he sign a book when entering and leaving the hospital; that he make such reports and give such attendances as may be required by the committee; and that he act under the general directions of the committee."

From the rules for the direction of officers and servants, which were approved by the hospitals committee of the corporation, it appeared that the infectious diseases hospitals were under the management of that committee, who appointed the visiting physicians, resident medical officers, and matrons; and it was provided that "the visiting physician shall be responsible for the treatment of the patients from the beginning to the end of their stay, and also for their freedom from infection when discharged."

Tobin, K.C., and *J. H. Layton*, for the plaintiff. The plaintiff is entitled to judgment. The jury have found that there was an undertaking by the defendants with the plaintiff that their visiting physician should act with reasonable care and skill in and about the discharge of the plaintiff's son from the hospital, and there was evidence to support the finding. No doubt the defendants discharged their obligation to provide a reasonably skilful medical officer in the sense that they provided a medical officer who was competent to take charge of and attend to patients suffering from infectious disease; but they also impliedly undertook that he should act with reasonable skill in discharging the patient, and that not merely because the jury have found

such an undertaking, but also as a matter of law necessarily following from the facts. Further, it is clear upon the terms of, and the rules governing, his appointment that the doctor was the servant of the corporation, and there is nothing in the case to absolve the defendants from the consequences resulting from their servant's negligence. The defendants had, under s. 132 of the Public Health Act, 1875, power to charge the plaintiff with the expenses of his child's maintenance in the hospital, which is inconsistent with the view that their sole duty was to supply a reasonably competent medical man; it follows from it that they had a further duty towards the plaintiff arising from an implied undertaking not to discharge the boy till he was cured. Apart from any question arising from the relationship of master and servant, there was an absolute duty on the defendants not to discharge a patient in a state likely to communicate infection; for they had brought upon their premises a person dangerous to others as long as he was in a condition of infection, and they were bound within the principle of *Rylands* v. *Fletcher* (1) not to allow him abroad to the danger of other persons. [They also cited *Warwick* v. *Graham*. (2)]

Taylor, K.C., and *Cuthbert Smith*, for the defendants. There was no evidence to support the finding of the jury of an undertaking by the defendants that the visiting physician should act with reasonable skill and care in and about the discharge of the plaintiff's son from the hospital; that can only mean that the defendants either undertook themselves the medical treatment of the boy, or that they undertook to supervise his treatment by the visiting physician, neither of which was in their power to do. The only undertaking which the defendants did, or could, give was to supply reasonably competent medical treatment in their hospital, and that they admittedly did; in that they were in precisely the same position as the plaintiff himself would have been, if he had kept his son at home instead of assenting to his removal to the hospital. The relationship of master and servant did not exist between the defendants and the visiting physician; the latter acted as their

(1) (1868) L. R. 3 H. L. 330. (2) [1899] 2 Q. B. 191.

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medical adviser, and not as their servant. [They cited *Hall* v. *Lees* (1); *Reg.* v. *Rawtenstall Corporation.* (2)]

WALTON J. This case raises a question of considerable difficulty. [After stating the facts substantially as above, the learned judge continued:—] Under these circumstances, are the defendants liable in this action? Of course, if the fifth finding of the jury stands, there can be no doubt as to their liability, that is, if there was an undertaking on the part of the defendants, not of course expressed, but to be inferred from the circumstances, that Dr. Archer should act with reasonable care and skill in or about the discharge of the boy from the hospital, and if, as the jury have found, he did not use reasonable skill and care. Practically, the question which I have to decide is whether there was any evidence of such an undertaking, or of such a duty as is expressed by the finding of the jury in their answer to the fifth question; or, to put it in another way, whether upon the admitted facts and the finding of the jury that there was a want of reasonable care and skill by Dr. Archer in or about the discharge of the boy from the hospital the defendants are liable in this action.

It has been contended that the defendants were absolutely bound not to discharge any patient from their hospital who was, in fact, in a condition likely to cause contagion; but it would be a very serious burden upon public bodies who carry on similar hospitals if it were held that they were under any such absolute obligation, and this may be illustrated by the facts in the present case. The suggested negligence, which has been found by the jury, consisted in this. When discharged the boy had no signs of fever at all; all the characteristic discharges had entirely ceased, but he admittedly had at the corner of his mouth on one side a small sore. Medical gentlemen who were called as witnesses were unable from their own experience to give any explanation of it or to suggest any theory which would explain it; but they were of opinion that a patient recently recovered from scarlet fever who had such a sore was more likely to cause contagion than a person whose condition was in all other respects

(1) [1904] 2 K. B. 602. (2) (1894) 10 Times L. R. 643.

the same but who had no sore, and they said that they would not have discharged the boy as long as the sore remained. That seems to have been the view of the jury. It was, however, admitted on all hands that the cause of contagion in scarlet fever is extremely obscure. There was a great deal of uncontradicted evidence to the effect that, although a patient upon his discharge might appear perfectly well and free from anything that could cause contagion, cases occasionally occurred in which contagion was caused by such a patient; in other words, that it is impossible absolutely to prevent contagion in the case of patients discharged from scarlet fever hospitals. I mention this by way of illustration, as shewing what a serious obligation would be imposed on those who have charge of such hospitals if it were held that there was an absolute duty on them not to discharge a patient who might possibly cause contagion to others, a thing which no skill or care can absolutely prevent. I see no reason for holding that there was any such obligation on the defendants. However, it has been put by the plaintiff's counsel as an absolute duty imposed upon the defendants entirely irrespective of any negligence on the part of the doctor or of any of their servants, and the well-known case of *Rylands* v. *Fletcher* (1) has been cited in support of that contention, but I have come to the conclusion that there is no sufficient ground for holding that there is any such duty or obligation.

There being, then, no absolute obligation not to discharge a patient who may possibly cause contagion, what is the obligation or duty imposed upon or undertaken by the defendants in a case like the present? In my opinion they undertake the duties of persons who manage and carry on the business of a hospital, that is, the duties of persons who undertake to manage and carry on the business of a hospital with all skill and care. It has been said that the defendants were entitled under certain sections of the Public Health Act, 1875, to charge the plaintiff for the expenses of his son's residence and treatment in the hospital. Assuming this to be the case, I still think that the obligation and duty of the defendants should be described and limited as I have mentioned. They do not undertake the duties

(1) L. R. 3 H. L. 330.

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of medical men or to give medical advice, but they do undertake that the patients in their hospitals shall have competent medical advice and assistance, and it is admitted that Dr. Archer was a competent medical man, and that no blame attaches to the defendants for employing him. Assuming that he made a mistake, even a negligent mistake, I do not think that the defendants are liable for its consequences; they have done all that the parent himself could have done, had he been able to have his son treated in his own house; he could not have done more than provide a proper home for the boy, and provide nurses and good medical attendance. The defendants have not failed in any of these respects, and I think that they are not liable for the mistake, if there was a mistake, of Dr. Archer. It is contended that the doctor was the servant of the defendants for the purpose of discharging the child, and that they are liable for the negligence of their servant, but the terms of his appointment, and the rules under which he acted, do not bear out this contention. No doubt he was an officer of the defendants, and was paid an annual salary, and in certain matters had to obey the directions of the committee; but the rules shew that he was "responsible for the treatment of the patients from the beginning to the end of their stay, and also for their freedom from infection when discharged"; that is, he was responsible for deciding whether or not they were free from infection when discharged. The rules are, in my opinion, perfectly plain. The visiting physician has to consider the case and to exercise his judgment, skill, and knowledge in determining whether the patient can safely be discharged or not; upon his deciding that a patient is fit for discharge, the matron discharges him.

As I have already said, I do not think the argument is well founded that the discharge is a discharge by the doctor as the servant of the defendants, and that they are liable for the consequences of his negligence. What the doctor really does is to advise the corporation, and he gives his opinion as a medical man. If the defendants have employed a competent, skilful, and duly qualified medical man, they have done all that it was possible for them to do—they cannot control his opinion in any kind of way: indeed, it would be wrong for them to attempt to do so;

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all they can do is to employ a competent medical man, and to act upon his opinion and discharge the patient. In my opinion there was in the present case no ground of complaint—no cause of action—against the defendants, and there was no evidence to support the finding of the jury on the fifth question, which I left to them with great hesitation. I think, therefore, that my judgment must be for the defendants.

Judgment for the defendants.

Solicitors for the plaintiff: *Layton, Son & Calder, Liverpool.*

Solicitor for the defendants: *E. R. Pickmere, Town Clerk, Liverpool.*

W. J. B.

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Oct. 31; *Nov.* 1.

MAYOR AND CORPORATION OF CHICHESTER *v.* FOSTER.

Highway—Locomotive—Traction Engine—Excessive Weight—Injury to Water Main.

The plaintiffs, who were the road authority within their district, were also the owners of the water mains beneath the roads. A duly licensed traction engine belonging to the defendant, weighing upwards of ten tons, and drawing three trucks, broke the water main under one of the streets for which the plaintiffs were the road authority. The main had been laid at least thirty years, but was found as a fact to be sufficiently strong and well laid to withstand the pressure of the ordinary traffic of the district. The plaintiffs had been guilty of no neglect or default in the execution of their duty as the road authority, and neither the defendant nor his servants had been guilty of any neglect or want of skill or care in the construction or user of the traction engine. A county court judge found that the injury was caused by the excessive weight of the defendant's traction engine, and that the defendant was liable for the cost of repairing the broken water main:—

Held, that in using an exceptionally heavy locomotive the defendant was exercising his right to use the highway in a way that was not necessary in order to enable him to enjoy it, and that the decision was right.

Attorney-General v. *Scott*, [1905] 2 K. B. 160, considered.

APPEAL from a decision of the judge of the Chichester County Court.

The action was brought to recover 2*l.* 10*s.* as damages for injury sustained by the plaintiffs in respect of the breaking of

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one of their water mains by a traction engine, the property of the defendant. The facts as stated in the written judgment of the county court judge, and his conclusions, are as follows:—

The plaintiff corporation were the owners of the water system in Chichester in general, and in particular of the water mains in the street where the accident occurred. These mains had probably been laid for at least thirty years; they were not, judged by the standard of to-day, of the best construction, being cast in such a way that on one side of the elliptical tube the metal was considerably thinner than on the other. They were laid in the soil without cement or other special preparation, and at a depth which left a space of about twenty inches between the crown of the pipe and the crown of the road; but, though they had been so long in the ground, the pipes were not corroded or decayed, and were still substantially fit to withstand ordinary pressure. The main in question was broken by the weight of a duly licensed traction engine belonging to, and being at the time used by, the defendant passing over it at a spot where a supply pipe was connected with the main by a union screwed into the main on its top side, the probable immediate cause of the fracture being that the union became deflected under the pressure, and so exerted a leverage on the pipe greater than the pipe could stand.

The county court judge found that there was no negligence or want of reasonable skill or care on the part of the defendant or his workmen, either as regarded the construction or the user of the engine, and that the damage was caused simply by the great weight of the engine, which weighed ten tons and upwards. He also found that the pipe in question was, at the date when it was broken, sufficiently strong and well laid to withstand the pressure of the ordinary traffic of the district, and that the defendant's traction engine was by reason of its weight likely to damage pipes constructed and laid in the manner in which the pipe in question was constructed and laid. The judgment then proceeded as follows:—

"From these findings of fact it follows, in my opinion, that the defendant is prima facie liable for the damage done by his engine to the plaintiff corporation's pipe on the principle I have

mentioned, viz., that his engine is, under the circumstances, a dangerous thing, and that he is liable for any damage caused to the property of the plaintiffs by his use of that dangerous thing upon the highway. The question whether a given machine, when used on a highway, is dangerous or not within the meaning of the principle, must, I conceive, be considered in relation to the actual condition of things on, or under, or adjacent to the highway, existing at the time of user, assuming that there is nothing in the condition of things of an unusual or exceptional character or arising from the illegal or negligent conduct of persons other than the person using the dangerous machine. If these water pipes had been constructed of such a strength, or laid at such a depth or in such a protective bed of concrete or otherwise as to withstand the pressure of a weight of ten or more tons passing over them, the defendant's machine would not have been dangerous in relation to this pipe, but under the actual circumstances I find that it was dangerous.

"It was contended for the defendant that the pipe was badly and negligently constructed and laid, and that that was the cause, or an efficient part of the cause, of the damage, but I cannot agree to this. I find on the evidence that this pipe was sufficient in strength and sufficiently well laid in relation to the ordinary and lawful traffic existing at the time when it was laid, and I do not think that there was any duty on those who laid it, or upon the plaintiff corporation, to take into account or to reconstruct their water system so as to withstand exceptional pressures arising from the use of these ponderous modern road engines, which have only within recent years become at all common, and cannot, I think, even now be considered ordinary traffic of the country. Reliance was placed by both sides upon the Locomotives Acts, 1861 and 1865, legalizing and regulating the use of locomotives on ordinary highways, and by the defendant upon the fact that his engine was duly licensed by the proper authority under those Acts. But it is expressly enacted by s. 13 of the earlier, and s. 12 of the later, Act that nothing in those Acts is to exempt anyone from such liability as he would incur at common law to anyone who might be injured by or through his user of a licensed engine. The Acts make it

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clear that every one using a locomotive on the roads under the authority of the Acts does so at the risk of being liable for any injury which may be caused to others by such user, if at common law he would be liable under the same circumstances if the Acts had not been passed; e.g., if the engine is a dangerous thing within the principle of *Rylands* v. *Fletcher* (1), and damage is caused to the person or property of others lawfully and without negligence being in, under, or adjacent to, the highway.

"The case of *Gas Light and Coke Co.* v. *St. Mary Abbott's, Kensington* (2), seems to me decisive of the present case. There the defendants were under a statutory duty to repair a road, and yet were held liable for the damage done to the gas mains of the plaintiffs by their steam rollers because, although to use them was the most efficient way of doing their duty, it was not the only way, and they had therefore no exemption from the common law liability attaching to those who use dangerous machines. That decision was, I think, based not on negligence in the ordinary sense of the term but on the principle of 'sic utere tuo ut alienum non lædas,' which was applied in *Rylands* v. *Fletcher* (1); a fortiori must a defendant be liable who has done similar damage by the use of a like machine for his own private purposes and profit.

"The defendant's counsel relied on *Attorney-General* v. *Scott* (3), but upon examination that case proves to have been decided on a finding of fact that the damage done was caused primarily by the defective state of repair of the road which was attributable to the relator's own default. I find no such default or neglect of a duty to repair in the present case. . . . . Unless, therefore, I am to hold that it is the duty of bodies in the position of the plaintiffs to take steps from time to time to strengthen or relay their pipes so as to enable them to withstand increased pressures arising from the use of any new and heavier vehicles that individuals may from time to time find it to their advantage to put on the roads—a duty for which I find no warrant in authority, and which would throw an alarming and indefinite burden on such bodies, and generally in the last resort upon the

(1) (1868) L. R. 3 H. L. 330. (2) (1885) 15 Q. B. D. 1.
(3) [1905] 2 K. B. 160.

ratepayers—there has been no default on the part of the plaintiffs contributing to the damage done."

The learned judge gave judgment for the amount of the claim, and the defendant appealed.

E. B. Charles, for the appellant. The county court judge was wrong in holding that there had been no default on the part of the plaintiffs as the road authority. It was their duty to meet the increased user of the road by adapting it to bear the increased ordinary traffic that was brought upon it; this is the proper inference to be drawn from the recent case of *Attorney-General* v. *Scott* (1), and it is not sufficient to shew that the road was sufficient to bear the traffic of the district thirty years previously. The fact that the road and the pipe were in the same hands is against the plaintiffs, for they could either have strengthened the pipe or improved the road under which it was laid. Further, there is an express finding that the defendant was guilty of no negligence either in the construction or user of the traction engine, and in default of negligence he cannot be made liable for damage arising during its lawful user. The case of *Gas Light and Coke Co.* v. *St. Mary Abbott's, Kensington* (2), upon which the county court judge relied, is not in point, for in that case there had been a succession of breakages of the plaintiffs' gas pipes caused by the negligent user of the defendants' steam roller, whereas here there has been only one breakage and no negligent user of the engine. And the judge was wrong in finding the traction engine to be a dangerous thing; the mere fact that there had only been a single breakage of one pipe during the period of its use is sufficient to refute such a contention. The principle of *Rylands* v. *Fletcher* (3) has no application to the present case.

Hohler, for the plaintiffs. The judgment of the county court judge was right. Even assuming that *Attorney-General* v. *Scott* (1) is an authority for the defendant's contention that it is the duty of a road authority to keep its roads in such a condition as to bear the ordinary traffic of the district which may from time to

(1) [1905] 2 K. B. 160. (2) 15 Q. B. D. 1.
(3) L. R. 3 H. L. 330.

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time be brought on them, the defendant must have a finding that the accident was caused by, or was materially contributed to by, the condition of the road; but after the express findings of the county court judge there can be no question as to the fitness of the road to bear the traffic which might be reasonably expected to pass along it. The case is governed by the principle of *Gas Light and Coke Co.* v. *St. Mary Abbott's, Kensington* (1), for the defendant by his use of an unnecessarily heavy traction engine brought an excessive weight upon the road, and is responsible for any damage so caused. [He also cited *Jones* v. *Festiniog Ry. Co.* (2)]

Charles, in reply.

LORD ALVERSTONE C.J. I am of opinion that this appeal should be dismissed. When the grounds of the judgment of the learned county court judge are appreciated I feel no doubt that his view was right. We have been pressed with the argument that the fact that there was only one fracture of the pipe points to the conclusion that the fracture was due to the default of the plaintiffs as road authority in not providing a pipe sufficiently strong to withstand the pressure of ordinary traffic on this road, but the fact that there was only one fracture is not conclusive. No doubt the fact that there was only one break may be important in determining the question of fact whether the fracture was caused by something for which the defendant was responsible, but that question has been determined against him. It was open to the county court judge to find that, notwithstanding the weight of the traction engine, the damage arose because the pipe itself in the position in which it was laid was not reasonably fit to bear the weight of the ordinary traffic of the road, including traction engines; this was recognized in *Gas Light and Coke Co.* v. *St. Mary Abbott's, Kensington* (1), where the Court varied an injunction restraining the defendants from using steam rollers in such a way as to break or damage the mains, pipes, or works of the plaintiffs by inserting the words "properly laid" after the words "mains, pipes, or works of the plaintiffs." It was therefore clearly

(1) 15 Q. B. D. 1.

(2) (1868) L. R. 3 Q. B. 733.

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in the power of the county court judge to find that the pipe was broken, because, when the heavy engine came over it, it was not in a condition to bear the ordinary traffic of the road, including traction engines, and such a finding would have afforded a good defence to the action. But there is no such finding of the judge, and this Court cannot supply it. Some complication arises from the fact that the owners of the pipe are also the road authority, which was not the case in *Gas Light and Coke Co.* v. *St. Mary Abbott's, Kensington* (1); and if it could be shewn that the damage was caused by a breach of duty on the part of the plaintiffs as the road authority, no doubt there would be a defence to the action.

In the present case no question arises upon the provisions of the Locomotives Acts, and therefore the decision in *Attorney-General* v. *Scott* (2) is not a direct authority; but when that decision is looked at, its fair result is that a road authority must keep its roads up to date, that is, in a reasonably fit state to bear the traffic (including the traction traffic) which may reasonably be expected to come upon them.

Further, upon the question whether, because a pipe had been broken on this one occasion only, although the defendant's traction engines had been largely used over the road in question, the county court judge was bound to find that the damage was due to the inherent inability of the pipe, laid as it was, to resist the strain of the traffic that was brought upon the road and might reasonably be expected to pass over the pipe. It is necessary to see exactly what are the facts as found by the county court judge. He has found that the pipes were not corroded nor decayed, and were substantially still fit to withstand ordinary pressure; that there was no negligence or want of reasonable skill or care on the defendant's part in the construction or user of the engine; that the damage was caused by the great weight of the engine; that the pipe, at the date when it was broken, was sufficiently strong and well made to withstand the pressure of the ordinary traffic of the district; and that the defendant's traction engine was, by reason of its weight, likely to damage pipes constructed and laid in the manner in which the pipe in question was constructed and laid.

(1) 15 Q. B. D. 1. (2) [1905] 2 K. B. 160.

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That is a finding with respect to this particular engine, and not all traction engines. Then there is a further passage in which the judge, dealing with the contention that the bad and negligent construction and laying of the pipe was the cause of the damage, says: "I find, on the evidence, that these pipes were sufficient in strength and sufficiently well laid in relation to the ordinary and lawful traffic existing at the time when they were laid, and I do not think that there was any duty on those who laid this pipe, or on the corporation, to take into account or to reconstruct their water system, so as to withstand exceptional pressures arising from the use of these ponderous modern road engines, which have only within recent years become at all common, and cannot, I think, even now be considered ordinary traffic of the country." That is an express finding against any neglect on the part of the road authority to keep the road up to a proper standard, and that the use of such engines as the one in question was not a risk against which the plaintiffs ought to be compelled to guard; and later on in his judgment he expressly finds that there was no such default or neglect of a duty to repair as had been the case in *Attorney-General* v. *Scott* (1). These facts being found by the county court judge, the fact that in the present case the plaintiffs acted in the double capacity of road authority and water authority does not assist the defendant, because of the express finding that there was no neglect of duty on the part of the plaintiffs which caused or contributed to the damage.

In considering the question of the defendant's liability, it must be remembered that there was no necessity for him to use such a heavy engine, in which respect the case resembles *Gas Light and Coke Co.* v. *St. Mary Abbott's, Kensington* (2), where it was pointed out that there was no necessity for the use of such a heavy steam roller by the vestry. In his judgment (which was the judgment of the Court) Lindley L.J. said: "Now there is no dispute that the defendants can perform their duty without using steam rollers of such a weight as to injure the plaintiffs' pipes, but they say it is their duty and right to repair the roads in the most economical and best way, and to avail themselves

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of all improvements regardless of the effect on the plaintiffs' pipes. Field J. has held that this contention cannot be supported, and we are of opinion that his decision is correct." The judgment then proceeds to base that conclusion on the fact that there was no statutory enactment which expressly authorized the use of such heavy steam rollers, or authorized the vestry to repair in such a way as necessitated their use. The principle of that judgment applies to such a case as the one before us. No doubt it was convenient to the defendant that three trucks should be hauled at one time by the same engine, but there was no necessity for him to so carry on his business; he chose to do it and for his own purposes to make use of an exceptionally heavy locomotive. In my opinion such a traction engine has not become such a burden as the road authority is bound to provide against. The defendant was bound to shew that he was exercising a right in a way that was necessary in order to enable him to enjoy it, and he has failed to do so. On the findings of the county court judge, I think that his decision was right; and in the absence of any evidence of the necessity for using such a heavy engine, I should myself have come to the same conclusion.

WILLS J. I have also come to the conclusion that the appeal should be dismissed, because the finding of facts by the county court judge is hopelessly in the way of the defendant's contention. The action is brought to recover damages for injury to a water pipe, the action being to some extent complicated by the fact that the plaintiffs were not only the road authority, but had also succeeded to the rights of the water company. If it could be shewn that the damage was due to any failure of duty on the part of the plaintiffs in their capacity of road authority, there would no doubt be an answer to the action, and the question seems to be whether the plaintiffs, as the road authority, were guilty of any failure of duty in keeping the road in a proper state for the reception of the traffic which might reasonably be expected to pass over it. It seems to me that *Attorney-General* v. *Scott* (1) is a distinct authority for the proposition that it is their duty to alter the standard of a road from time to time, as the

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traffic upon it becomes larger or alters its character. Such cases present great practical difficulties, and I always direct juries on the basis that the standard of a road authority's duty must vary from time to time as the traffic becomes greater and more burdensome. If I could gather from the facts found in the judgment of the county court judge, that traffic by means of traction engines of this size and weight had become usual in the district, I should be disposed to say that the defendant's contention is right; but the decision upon the facts completely disposes of any such suggestion. I was struck by a passage, which my Lord has already read, in which the county court judge speaks of "ponderous modern road engines" not being considered ordinary traffic of the country. That is a question which must be decided by him as a matter of fact, and he has found distinctly that such engines are beyond the burden which a road authority ought to expect to have to deal with, and to which they ought to adapt the condition of their roads. The judge has negatived an essential condition of the plaintiffs' liability. He finds that the pipes were well laid and were sufficiently strong for ordinary traffic, which must mean that this traction engine was not ordinary traffic, and further, that the engine was likely to cause injury to the pipes under the road; if therefore there were any question of the engine being lawfully on the premises, there was none as to its likelihood to do damage; it was being used lawfully in one sense, but in a way likely to cause injury.

What would be a lawful excuse for the damage caused by the engine? No doubt the defendant would have had a defence if he could have succeeded in throwing the responsibility on someone else; and that involves the question which the county court judge dealt with as to whether such traction engines had become a kind of traffic against which the plaintiffs, as the road authority, ought to have provided. The judge has laid stress upon the well-known case of *Rylands* v. *Fletcher* (1); but I think the analogy suggested by him is misleading; the cases depend upon wholly different principles. Nor is *Gas Light and Coke Co.* v. *St. Mary Abbott's, Kensington* (2), decisive of the present appeal,

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for the facts brought that case within the principle of *Rylands* v. *Fletcher* (1): a road was under repair; the very heavy pressure exerted by a steam roller would naturally do the mischief that was done; the roller was passed backwards and forwards over the spot, and the way in which it was used made both the machine and the operation dangerous in themselves; that case was a legitimate application of the decision in *Rylands* v. *Fletcher*. (1) Under such circumstances as those existing in the present case I think that the defendant was bound to see that he brought no such weight upon the road as would do any mischief.

DARLING J. To my mind the matter of this appeal presents itself thus. The plaintiffs have the right, and indeed the duty, to lay and maintain the highway and the water mains beneath it. All people, including the defendant, had a right—not limited by time—to use the highway in a natural manner, having reasonable regard to the kind of traffic which would usually pass along it. This must involve a duty on the plaintiffs to vary the construction of the road from time to time, so as to adapt it to conditions of traffic which should at any given time become ordinary, although these were formerly unknown, afterwards rare, and at last not exceptional but usual. It is a duty the discharge of which might become more or less burdensome, for the road to Portsmouth may in time be as little used as is now the Roman road to Silchester.

The county court judge finds that this engine is not of the sort to be at present considered, on that road, a part of the ordinary traffic. I think it was not necessary to find, as the county court judge has done, that the engine is in itself a dangerous thing; and I very much doubt whether anything whatever can, strictly speaking, be called "a dangerous thing." That depends on its use—on environment. Water, which caused the injury complained of in *Rylands* v. *Fletcher* (1), is only dangerous under certain conditions, and so is fire. The expression "in itself dangerous" is used in the head-note to *Rylands* v. *Fletcher* (1), but I do not find it in the judgments; nor do I think it an appropriate expression

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anywhere, except, perhaps, as used by Mr. Pope in regard to "a little learning."

Appeal dismissed.

Solicitors for the appellant: *Stow, Preston & Lyttleton, for Raper, Freeland & Tyacke, Chichester.*

Solicitors for the respondents: *Palmer & Bull, for J. W. Loader Cooper, Town Clerk, Chichester.*

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Nov. 17.

[IN THE COURT OF APPEAL.]

BAINBRIDGE AND ANOTHER *v.* THE POSTMASTER-GENERAL AND ANOTHER.

Post Office—Telegraph Department—Wrongful Act of Subordinate Official—Action against Postmaster-General in Official Capacity—Immunity from Action—Telegraph Act, 1863 (26 & 27 *Vict. c.* 112), *ss.* 18, 42—*Telegraph Act*, 1868 (31 & 32 *Vict. c.* 110), *ss.* 2, 4—*Telegraph Act*, 1878 (41 & 42 *Vict. c.* 76), *s.* 11.

The Postmaster-General is not liable in his official capacity, as head of the telegraph department of the Post Office, for wrongful acts done by his subordinates in carrying on the business of the department.

APPEAL from an order of Walton J. upon an application to strike out the name of the Postmaster-General as defendant.

The plaintiffs in the action were John Bainbridge, whose claim was for damages for loss of services and wages owing to the personal injuries to the other plaintiff, his daughter, and Elizabeth Lawson Bainbridge, who claimed damages for personal injuries sustained by her through the negligence of the defendants or their servants. The writ stated that the plaintiffs' claim against the defendant the Postmaster-General was in his corporate capacity under statutes 26 & 27 Vict. c. 112, ss. 18 and 42, and 31 & 32 Vict. c. 110.

The second defendant, one Crane, was sectional engineer in Post Office employment, and responsible for work done at Wigan in connection with the telegraphs, at which place a footway had been taken up for the purpose of repairing a telegraph cable. The claim of the female plaintiff was based upon alleged negligence in relaying the footway, after the excavation had been filled

up, whereby she fell and sustained injury. The action was commenced by her as sole plaintiff against Crane as sole defendant, but the writ was subsequently amended, at her instance, by the Registrar of the Liverpool Registry of the High Court of Justice, by the addition of John Bainbridge as plaintiff, and the Postmaster-General as defendant. A summons was taken out on behalf of the Postmaster-General asking that his name should be struck out of the writ. The district registrar referred the matter to the learned judge, who declined to make the order asked for, but gave leave to appeal.

The Postmaster-General appealed.

Nov. 6. *Sir R. B. Finlay, A.-G.*, and *A. Hyslop Maxwell*, in support of the appeal. The question is whether the Postmaster-General is liable to be sued in tort in his corporate capacity, and it arises out of the taking over by the State of the undertaking of a telegraph company. The general Act regulating telegraph companies is the Telegraph Act, 1863, and by s. 42 of that Act there is a provision that the company is to be responsible in damages for the acts or defaults of the company, or of any person in their employment. By the Telegraph Act, 1868, s. 4, the Postmaster-General is empowered to purchase the undertakings of telegraph companies, and the undertaking and all other property purchased are vested in him in his corporate capacity, and in his successors in like manner. The preamble, put shortly, is that it would be to the advantage of the State that the Postmaster-General should be empowered to work telegraphs in connection with the administration of the Post Office. There is no indication in the preamble or any of the sections of the statute that any different liability was intended to be imposed upon him than that under which he was as head of the Post Office Department; indeed it would be a strange anomaly if the head of the department were to be liable for the wrongful acts of his subordinates in one branch but not in the other. It is said, however, that s. 2 of this Act incorporates the Act of 1863; and enacts that the term "company" in that Act is, in addition to the meaning assigned to it, to mean the Postmaster-General, and that if he is in the same position as a company he is liable, as a company

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would be, for the acts of his subordinates. Apart from the statutes it is clear there would be no liability. In *Lane* v. *Cotton* (1) it was held by a majority of the Court, Holt C.J. dissenting, that the relation between the head of a public department and his subordinate officers was not that of master and servant. The decision was considered and approved in *Whitfield* v. *Lord Le Despencer*. (2)

The question of the liability of the Postmaster-General came up for consideration in Ireland in *Jones* v. *Monsell* (3) in a case in which the Court came to the conclusion that the Postmaster-General was being sued in a personal capacity in an action of tort similar to this case. The Court held that he was not liable in his personal capacity for the acts of officers of the department not authorized or adopted by him, as they as well as the defendant were in the service of the Crown. The Court did not decide as to the liability of the Postmaster-General in his corporate capacity, but in his judgment Whiteside C.J. said: "We have not heard anything, nor is there in reason anything, to prove that the Postmaster-General is to be regarded in a different way than that in which he had been regarded before the passing of the Act," that is, the Act under which he took over the telegraphs. If he was not liable in a private capacity it is still clearer that he is not liable in a corporate capacity, unless there is something in the statutes to make him liable.

In *Raleigh* v. *Goschen* (4) Romer J. had before him an action against the Lords of the Admiralty, and pointed out that the defendants could not be sued in their official capacity, and the principle of the immunity of the heads of departments of State was fully admitted, although for special reasons arising from the statutes and the nature of the contract it was held that the action must be dismissed.

That being the position of the Postmaster-General apart from the statutes, it is inconsistent with the idea that by s. 2 of the Telegraph Act, 1863, he is put in exactly the same position as a company, and made liable to penalties and actions in respect of

(1) (1701) 1 Ld. Raym. 646; 12 Mod. 472.
(2) (1778) 2 Cowp 754.
(3) (1872) Ir. Rep. 6 C. L. 155.
(4) [1898] 1 Ch. 73.

things done by his subordinates as if they were his servants. His position is apparent from s. 11 of the Telegraph Act, 1878, which enables proceedings to be instituted by the Postmaster-General for the time being as if he were a body corporate. There is nothing said in that section about proceedings against him, but the introduction of the section would be idle if in fact he had been previously actually constituted a body corporate for all purposes. Under the provisions of s. 67 of the Post Office Act, 1840 (3 & 4 Vict. c. 96), the Postmaster-General is constituted a body corporate for the purpose only of the transmission of lands and tenements, acquired for the purposes of the Post Office, to his successors.

It appears therefore that by constitutional law the Postmaster-General cannot be sued in his corporate capacity for the alleged wrong committed by Crane, and that there is nothing in any of the statutes that extends his liability, in a matter relating to telegraphs, beyond that which he incurs in matters relating to the Post Office, but on the contrary the provisions which limit his corporate capacity to specific things are inconsistent with the right of the plaintiffs to sue him in that capacity. It may be also urged that had it been intended to make a Postmaster-General liable in such a case as the present some provision would have been made as to a fund to indemnify him.

F. E. Smith (*E. Wooll* with him), for the plaintiffs. The question of liability cannot depend on the existence of a fund out of which damages could be paid, and, further, the Postmaster-General holds, in his corporate capacity, property that could be taken in execution. The Telegraph Act, 1863, provided general regulations with regard to the construction or maintenance of telegraphs by companies authorized by special Act of Parliament, and by s. 42, such a company was to be answerable for injuries happening through the act or default of the company, or of any person in their employment, by reason of the company's works. It is clear that had the company that started these works continued in existence this action could have been maintained against them. Under the Telegraph Act, 1868, the Postmaster-General was substituted for the company, and took over the whole of the undertaking, which became under s. 4 vested in him in his

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corporate capacity. The Telegraph Act, 1863, is incorporated in the Act of 1868 by s. 2, under which the term "the company," as used in the earlier Act, is to mean, in addition to the meaning assigned to it in that Act, the Postmaster-General. It appears then that, reading the name Postmaster-General into s. 42 of the Act of 1863, there is direct statutory liability upon him for the acts of his subordinates. The position is that the Postmaster-General was substituted for a company; that he took over all the rights of trading and all the property of the company; and that there is no direct legislation that gives him immunity from any of the liabilities to which the company was subject. It is said, however, that not by direct legislation, but by inference, all rights against him of persons injured through the negligence of his subordinates were taken away. Had that been the intention of the Legislature it would have been expressed, and as it is not expressed it must be taken that the statute transferred not merely all the rights but also all the obligations of the companies purchased. The decision in *Jones* v. *Monsell* (1), supports this view for it indicates that the Postmaster-General could be sued in his corporate capacity for a tort committed by a subordinate, though he could not be sued personally in a case in which he had not directed the doing of the wrong. The constitutional theory on which reliance has been placed, that as the King can do no wrong, those who do wrong in his name cannot be made liable, was formed before Government departments took to trading and is quite inapplicable to such a case as that of the telegraph department of the Post Office.

Reliance has been placed on s. 11 of the Telegraph Act, 1878, but that section has no bearing on the point before the Court. It does not touch the case of proceedings against the Postmaster-General, but provides for a position not dealt with by the mere substitution of the Postmaster-General for the company. The case therefore comes back to the constitutional theory which is said to exonerate the Postmaster-General, but as against that there are the express provisions of the statutes which place him in the position of the companies which he supersedes, and subject to the rights and liabilities to which they were subject.

(1) Ir. Rep. 6 C. L. 155.

Sir R. B. Finlay, A.-G., in reply. A master is liable for the acts of his servants, but the whole current of authorities shews that the subordinate officers of a Government department are not the servants of the head of the department. There is no analogy between a trading company and the department of State carried on by the Postmaster-General. As to his immunity on taking over undertakings previously carried out by companies or individuals, it may be noted that, if they are to be regarded as trading departments of the State, there is no difference between the Postal and the Telegraph Departments, and as to the former, the question of liability came before the Court as far back as the time of Lord Holt in the year 1701.

Cur. adv. vult.

Nov. 17. COLLINS M.R. This case comes before us by way of appeal from Walton J., and it arises under the following circumstances. A daughter of the first-named plaintiff was injured by reason, as she alleges, of the negligence of one Crane, who is a subordinate official of the Post Office; and the action was brought in the first instance in her name against Crane, charging him with the responsibility for the pain and damage sustained by her, through an accident arising out of his negligence in dealing with the laying of an electric wire. Afterwards her father was introduced, claiming damages consequent upon the loss of services and injury of his daughter, and a further amendment was made adding the Postmaster-General as defendant, and upon that addition the question to be decided arises. Application was made on the part of the Postmaster-General to have his name struck out on the ground that there was no cause of action against him.

The amendment states that the action is against the Postmaster-General in his corporate capacity under the statutes 26 & 27 Vict. c. 112, and 31 & 32 Vict. c. 110. The first of those Acts, the Telegraph Act, 1863, provides for the construction and maintenance of telegraphs, and a number of provisions are laid down applicable to the construction of telegraphs by companies. By s. 3, the definition of a company is: "The term 'the company' means any company to be hereafter authorized as aforesaid (herein-after distinguished by the term 'future

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company'), or any company already so authorized (herein-after distinguished by the term 'existing company')." Then follow provisions in s. 6 giving general powers to the company to execute works. The company may place and maintain a telegraph under any street or public road, and may alter or remove the same, and there are a number of other provisions incidental to laying telegraph wires. Then there is s. 18, the side-note of which is: "Streets and public roads to be restored and kept in repair for six months." It provides for the carrying away of the rubbish, and by sub-s. 2, "they shall in the meantime cause the place where the street or public road is opened or broken up to be fenced and watched, and to be properly lighted at night." By sub-s. 3, "They shall pay all reasonable expenses of keeping the street or public road in good repair for six months after the same is restored, so far as such expenses may be increased by such opening or breaking up: If the company fails to comply in any respect with the provisions of the present section, they shall for every such offence (without prejudice to the right of any person to enforce specific performance of the requirements of this Act, or to any other remedy against them) be liable to a penalty not exceeding twenty pounds, and to a further penalty not exceeding five pounds for each day during which any such failure continues after the first day when such penalty was adjudged: and any such penalty shall (notwithstanding anything herein-before, or in any Act relating to municipal corporations or to the Metropolitan Police Force, or in any other Act, contained) go and belong to the body having the control of the street or public road, and shall form part of the funds applicable by them to the maintenance of the street or public road." Then comes s. 42, which is the one most relied upon in this case, which provides that: "The company shall be answerable for all accidents, damages, and injuries happening through the act or default of the company or of any person in their employment by reason or in consequence of any of the company's works, and shall save harmless all bodies having the control of streets or public roads, collectively and individually, and their officers and servants, from all damages and costs in respect of such accidents and injuries."

That was the law regulating the companies who undertook the duty of laying down telegraph wires, and subsequently the Act upon which the question in this case arises, namely, the Telegraph Act, 1868, was passed. The preamble is: "Whereas the means of communication by electric telegraphs within the United Kingdom of Great Britain and Ireland are insufficient, and many important districts are without any such means of communication: And whereas it would be attended with great advantage to the State, as well as to merchants and traders, and to the public generally, if a cheaper, more widely extended, and more expeditious system of telegraphy were established in the United Kingdom of Great Britain and Ireland, and to that end it is expedient that Her Majesty's Postmaster-General be empowered to work telegraphs in connection with the administration of the Post Office." Then it proceeds to enact, by s. 2: "The Telegraph Act, 1863, shall be incorporated with this Act, except so far as the same, or any part thereof, may be expressly varied, altered, or be inconsistent with this Act; and the term 'the company' in the Telegraph Act, 1863, shall, in addition to the meaning assigned to it in that Act, mean the Postmaster-General." Then powers are given, by s. 4, to the Postmaster-General to purchase certain undertakings, and any undertaking and all other property purchased under the powers of the Act are vested in him in his corporate capacity. He is for certain purposes made a corporation. Something turned upon that in the course of the argument, but for the present I do not think I need refer further to that Act, because I have now got the essential conditions out of which the plaintiffs say the liability arises.

It is said that this action would have lain against the author of the wrong, the defendant Crane, and that it ought to lie against the person upon whose behalf and upon whose order Crane did the work. On looking at the legislation charging the Postmaster-General with the duty of dealing with telegraphs, we find that he is one of the persons who, under the Telegraph Act, must be taken to be charged with all the duties imposed upon the company in that Act, inasmuch as it has been directed by the section I have just read, that the Postmaster-General is to

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be added as within the meaning of the term "company" in the Act. It is said that if into the 42nd section of the Act of 1863 there is read, "the Postmaster-General" in addition to "the company," then it follows that the Postmaster-General is responsible for the acts of the subordinate, Crane, and that therefore there is a claim in damages against him in his corporate capacity.

That is the point which has been raised, and what we have got to see is whether the effect of that legislation is sufficient to fix the Postmaster-General in his official capacity (I prefer that word to his corporate capacity) with responsibility for the damage caused by the negligence of Crane. Now, apart from these enactments, it seems to me to be perfectly clear law that he would not have been liable for the negligent act of a subordinate officer; and it is important to see upon what reasoning the conclusion was arrived at that the Postmaster-General would not be responsible for the act of a subordinate official, unless there were direct proof that he had ordered or directed the act to be done, if that act purported to be done on his behalf.

That question arose a long time ago, and the leading authority upon it is *Lane* v. *Cotton* (1), decided as far back as the year 1701. The side-note in that case is this: "The head of a public office under Government with power to appoint and remove the servants of the office who are to be paid by, and give at his discretion security to Government is not responsible to an individual for a loss occasioned by the default of such servants. The servant who is guilty of the default is. The Postmaster-General is not answerable for a packet delivered to the receiver at the Post Office and lost out of the office." Lord Holt differed from the opinion of the other judges, three in number, who decided that case, and when the case came up for discussion afterwards, in the time of Lord Mansfield, the whole Court adopted the judgment of the majority in that case, differing from the contrary opinion of Holt C.J.; and it seems to me that the principle upon which the majority acted was adopted and made the basis of the judgment in the subsequent case. Therefore I will refer shortly to the judgment of the majority in the earlier

(1) 1 Ld. Raym. 646; 12 Mod. 472.

case, in order to shew what was the principle upon which they arrived at their conclusion. Gould J., who is the first of the judges to give judgment, says, at p. 648 of the report: "If anything can support this action, it must be a contract expressed or implied; but here is neither the one nor the other. The security of the dispatches depends upon the credit of the office, as founded upon the Act. Breese," that is, the delinquent receiver, "is as much an officer as the defendants, but they are more general officers. But Breese is the King's officer, and if there is any contract, it is between the plaintiff and Breese; which appears by the Act, which appoints several acts for all, and puts confidence in all. And therefore they resemble a community of officers acting in several trusts; and everyone shall answer for himself, not one for the act of another, as in case of a dean and chapter, 1 Edward V. 5 a. If the defendants had died, yet Breese would have continued officer; and therefore Breese has a charge and trust of himself, and is not a deputy to the defendants." Then Powys J. says, at p. 650 of the report: "The defendants have not the power of the management of the office according to their discretion, but are subject to the control of the King and of the Treasury. And because the inferior officers are servants of the King, and not of the defendants, their wages being paid to them out of the revenue of the Post Office, and the security taken of them in the name of the King; and therefore it is unreasonable, that the defendants should be answerable for the acts of the inferior officers." Then Turton J. gave judgment to the same effect, and the result is that, on the ground that there is no relation of master and servant, or principal and agent, between a subordinate officer of the Crown and his superior officer, it was held that the superior officer was not liable for the particular act in that case of his subordinate officer; and the same principle applies whether the claim be one in tort or in contract. Being all equally servants of the Crown, they are not servants of each other.

This decision came up for discussion in Lord Mansfield's time in the case of *Whitfield* v. *Lord Le Despencer* (1), and the dissenting judgment of Holt C.J. was very closely canvassed, with

(1) 2 Cowp. 754.

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the result that the Court adopted the decision of the other judges, and, as I think, clearly on the ground that I have indicated. The side-note is this: "Case does not lie against the Postmaster-General, for a banknote stolen by one of the sorters out of a letter delivered into the Post Office." Lord Mansfield says (1): "The Postmaster has no hire, enters into no contract, carries on no merchandise or commerce. But the Post Office is a branch of revenue, and a branch of police, created by Act of Parliament. As a branch of revenue, there are great receipts; but there is likewise a great surplus of benefit and advantage to the public, arising from the fund. As a branch of police, it puts the whole correspondence of the kingdom (for the exceptions are very trifling) under Government, and entrusts the management and direction of it to the Crown, and officers appointed by the Crown. There is no analogy therefore between the case of the Postmaster and a common carrier. The branch of revenue and the branch of police are to be governed by different officers. The superior has the appointment of the inferior officers; but they give security to the Crown. One requisite is that they shall take the oaths taken by all public officers. Another strong guard is that they are made subject to heavy penalties." A little lower down he says: "If the man who receives a penny to carry the letters to the Post Office, loses any of them, he is answerable; so is the sorter in the business of his department. So is the Postmaster for any fault of his own. Here, no personal neglect is imputed to the defendants, nor is the action brought on that ground; but for a constructive negligence only, by the act of their servants. In order to succeed therefore it must be shewn, that it is a loss to be supported by the Postmaster, which it certainly is not. As to the argument that has been drawn from the salary which the defendants enjoy; in a matter of revenue and police under the authority of an Act of Parliament, the salary annexed to the office, is for no other consideration than the trouble of executing it. The case of the Postmaster, therefore, is in no circumstance whatever, similar to that of a common carrier," to which Holt C.J. had likened him. He goes on at the end: "If there could have been any doubt therefore before the determination

(1) 2 Cowp. at p. 764.

of *Lane* v. *Cotton* (1), the solemn judgment in that case having stood uncontroverted ever since puts the matter beyond dispute."

Now, these passages which I have read shew that the Court adopted the reasoning of the authority in the earlier case and arrived at the conclusion that these subordinate officers are officers of the Crown, and not in the relation of servants to their superior officers.

That being so, I have to consider how far, if at all, the legislation that I have referred to in these Acts has altered the immunity of the Postmaster-General. We must look to see where any words are to be found in these Acts which would cut down or alter the position of the Postmaster-General in relation to telegraphs from that which his position would be with respect to his ordinary duties as Postmaster-General before he took over the telegraphs, and it seems to me that, when one analyses the sections which are supposed to import this liability, they leave the Postmaster-General where he was before. In his official capacity, he retains any immunity that he had before he was put into this section. The process by which he has been put in I have described, namely, by altering the definition of the word "company" in the earlier Act of 1863. So now I take the obligation imposed in the 42nd section of that Act, which is the one that is relied upon most, and I add the word "Postmaster-General," as I am told to do by virtue of that definition, and see whether, reading it with his name included, there is a liability imposed in this case. Sect. 42 so read is "The Postmaster-General shall be answerable for all accidents, damages, and injuries happening through the act or default of the Postmaster-General or of any person in his employment by reason or in consequence of any of the Postmaster-General's works, and shall save harmless all bodies having the control of streets or public roads, collectively and individually, and their officers and servants, from all damages and costs in respect of such accidents and injuries." That is the basis of the obligation.

It is not suggested here that the Postmaster-General had himself anything to do with this matter. If he can be reached

(1) 1 Ld. Raym. 646; 12 Mod. 472.

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at all, he must be reached upon the footing that Crane was in his employment. On the reasoning that I have pointed out in the cases which have been referred to, that condition is not fulfilled in this case. Crane was not in the employment of the Postmaster-General. He is a subordinate officer of the Crown, and, therefore, the nexus is at once broken between the Postmaster-General and Crane, and that is enough to dispose of this case.

But there are other difficulties in the way which might apply. The Postmaster-General is sued here in his official capacity. There is no provision in the sections of this Act, providing for any fund out of which damages should be paid by the Postmaster-General. The revenue of the country cannot be reached by an action against an official unless there is some provision to be found in the legislation to enable this to be done. There is clear authority for this proposition in the head-note in the case of *Palmer* v. *Hutchinson* (1), decided by the Privy Council on appeal from the Supreme Court of Natal. It is this: "In a suit against Her Majesty's Deputy Commissary-General for Natal, and as such representing Her Majesty's Commissariat Department, to recover certain moneys as the price or hire of certain waggons and oxen, for the carriage of certain goods, for damages for illegal acts of defendant or his employés, and for general damage:—*Held*, on exceptions by the defendant to the jurisdiction of the Court and to the declaration, that the defendant could not be sued, either personally or in his official capacity, upon a contract entered into by him on behalf of the Commissariat Department; and that there was no cause of action against him. The Government revenue cannot be reached by a suit against a public officer in his official capacity."

I think the case is analogous to that which was before the Court in *Viscount Canterbury* v. *The Attorney-General* (2), for there the Lord Chancellor, Lord Lyndhurst, says: "But then it is said, these officers are appointed by the Crown, and are removable at the pleasure of the Crown. That circumstance alone will not, I conceive, create any such liability. The Keeper of the Great Seal and other persons holding high situations

(1) (1881) 6 App. Cas. 619.

(2) (1842) 1 Ph. 306, at p. 324.

in the State have authority to appoint to many offices, and also to remove the persons so appointed at their pleasure. But they are not, on that account, subject to make compensation for injury occasioned by the neglect or misconduct of the persons so appointed. The mere selection of the officers does not create a liability. But if the Crown would not be responsible for the act done, had it been done by the superiors, it follows that it cannot be held liable for the negligence of their subordinate agents whom they appoint and remove, and with the selection or control of whom the Crown has no concern." That, of course, is not the point here, but the observation as to the relation of the persons nominated for appointment to the officials who nominate them is applicable to the present case.

On the whole, therefore, without going more in detail into the legislation, it seems to me on the authorities that I have cited that in this case the nexus of principal and agent, or master and servant, between the Postmaster-General and Crane, who is described as the Post Office sectional engineer for the Wigan district, is broken.

I will refer shortly to one or two more authorities. The point as to the liability of the Postmaster-General was raised in Ireland in *Jones* v. *Monsell* (1), the only case, I think, in which this particular Act has come under discussion. The question there was, whether the Postmaster-General in his personal, as distinguished from his official, capacity was liable. The Court came to the conclusion, in the first instance, that the action was brought against him not in his official, but in his individual capacity, and they pointed out that the section putting the Postmaster-General into the shoes of a company obviously dealt with the Postmaster-General only in his corporate capacity or in his official capacity, and not in his individual capacity. That was enough to determine that action against the applicant. The Court in that case left open the question what would have been the rights of the parties had the defendant been sued in his official capacity, and they undoubtedly by some expressions in the case seem to think that incorporation is the cardinal distinction. There might be, I think, some extra difficulty if we were to make the question whether he was incorporated or not, the test of his liability. It seems to

(1) Ir. Rep. 6 C. L. 155.

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me he may well be and is for many purposes acting in his official capacity, although he has not been specially incorporated for that purpose. It is curious that the Legislature does incorporate him for certain special purposes, but, so far as I know, he is not incorporated for all purposes connected with his official work. Therefore, I do not rely upon what was suggested by the Attorney-General, basing himself on that case, that the Postmaster-General has not been incorporated for the purpose of being sued in actions such as this. I think, if incorporation were the test, it might well be contended that he has never been incorporated for such a purpose, and that, therefore, he must be treated as being sued not as an incorporated person, but in his private capacity. I do not think, however, that the argument would be good, for, in my view, the true meaning of this Irish case is not to make incorporation the test, but to emphasize the difference between what he does in his official capacity, and what he does in his capacity as a private individual, and, therefore, it seems to me that, although it were shewn that he was not incorporated, he might still be liable, if he could be liable, in his official capacity. I refer to that in order to mark that distinction.

The whole law as I have attempted to state it has been already stated by my brother Romer in a recent case of *Raleigh* v. *Goschen* (1), which clearly formulates the general proposition as to the immunity of public servants for acts done by their official subordinates unless a special mandate, or an adoption of the act purporting to be done on their behalf, is proved.

It seems to me, therefore, that the learned judge was wrong in not stopping the action as against the Postmaster-General, but I am bound to say that, although not expressly empowered now to refer a case to us, he seems to have done in this case very little more than to invite us to consider it—not giving any final or formal opinion himself. Our judgment, however, must take the form that we differ from his view, and the appeal must succeed.

MATHEW L.J. I am of the same opinion. It seemed to me when it was admitted, as it appeared to be, that the

(1) [1898] 1 Ch. 73.

Postmaster-General enjoyed an immunity from proceedings in cases of this kind before the Telegraph Acts, that the position taken on behalf of the respondents became manifestly untenable. It was said that, although there was that immunity with reference to the transmission of letters, yet when the telegraph system was annexed to the Post Office Department of the State the position or status of the Postmaster-General was different, because the transmission of the correspondence or communication was not by letter but by telegraph. Anything more improbable than that there should be a difference in the status of the Postmaster-General with regard to each of these departments could scarcely be conceived. The legislation as to the acquisition of the telegraphs appears to be perfectly simple. There being a department having the control of correspondence by letter, it was thought in the public interest desirable that it should acquire the telegraph system which related to transmission of correspondence and communications by electricity. The property of the different companies was acquired by the State, and the superintendence of the system of telegraphs was annexed to the Post Office Department. It is an entirely analogous department of the business to that with which the Postmaster-General had previously been entrusted. Apparently, therefore, the same consequences of immunity exist as existed before the telegraph system was taken over. It was said that, looking critically and carefully at the language of the Act, there can be found an intention on the part of the Legislature to alter the status of the Postmaster-General in respect of his dealings with the telegraph system. It becomes of importance to see where this incorporation originated. It is found first in the Act of 1840, s. 67, not an Act incorporating (if that expression is allowable) or quasi-incorporating the Postmaster-General for all purposes, but merely constituting him a corporation, or a quasi-corporation, for the purpose of securing continuity of title. The Postmaster-General has vested in him property for the purpose of his position as Postmaster-General. Whenever an alteration in the occupier of the office takes place, it would be necessary to provide for the transmission, in the ordinary way and by the ordinary methods, of that property to the successor. It was determined that that

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was inconvenient and undesirable, and, therefore, the section of the Act was passed with a view to securing automatically the transmission of the right to property. That is the whole purpose of that section of the Act of Parliament, and the whole object of the quasi-incorporation of the Postmaster-General. I cannot help thinking it was a clumsy way of bringing about a result which might have been accomplished in a few lines instead of in a lengthy section; however, there it is. That was the position of the Postmaster-General after that Act had passed, and the Act had no operation in altering his status. Afterwards there came the annexation to the Post Office of the control of the telegraph system of the United Kingdom. Under the legislation the public acquired the rights of the telegraphs with a view to the transmission under public authority of correspondence by electrical means, but no intention is apparent to alter the constitution or position of the head of the department, or of his subordinates. It has been argued that when the Postmaster-General acquired from the telegraph companies their different undertakings he took the position of those from whom the systems were acquired; they had carried on their business through subordinates, for whose defaults they were responsible; ergo, the Postmaster-General succeeding them was placed exactly in the same position. So that, from having been a public officer with immunity from proceedings of this description, he became at once the master of all the persons employed in this department of the Post Office, and responsible for their defaults or their misconduct. It is incredible that any such view could have been entertained by the Legislature, the effect of which would be to transform a public officer, the head of a great department of the State, into the manager of a commercial undertaking. I do not think it is asking too much of the Legislature, if a great change of that sort is contemplated, that the public should be clearly informed what the new position of the Postmaster-General is. There is no trace of a statement to that effect in the course of the legislation upon this subject. Further, if the Postmaster-General is to be placed in a position of liability, whether official or personal, some provision would have been made to protect him from charges due to the defaults of the subordinate officers of the Post Office. There

is not a provision to that effect. The mere statement of the case made on the part of the respondent in this case condemns the position as wholly untenable. For these reasons, and the reasons given by my Lord, I am clearly of opinion that this appeal must be allowed.

Appeal allowed.

Mathew L.J.

Solicitors for the plaintiffs: *Norris, Allens & Chapman, for North, Kirk & Co., Liverpool.*

Solicitor for the Postmaster-General: *Solicitor to the Post Office.*

A. M.

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Nov. 27, 28.

JAMES JOICEY & CO., LIMITED, AND THE EXECUTORS OF S. A. D. EDEN *v.* THE NORTH EASTERN RAILWAY COMPANY.

Mines—Compensation—Railway Company—Coal required to be left unworked—Railways Clauses Consolidation Act, 1845 (8 & 9 *Vict. c.* 20), *s.* 78.

In 1886 a coal company obtained a lease entitling them to carry away all the coal within and under certain lands for a term of twenty-one years. In 1887 a railway company by a special Act, which incorporated the Railways Clauses Consolidation Act, 1845, obtained power to construct a railway over these lands, and the railway was made accordingly. In 1892 the coal company, being desirous of working the coal under the railway, gave notice to the railway company under s. 78 of the Railways Clauses Consolidation Act, 1845, and were required by them to leave unworked certain coal which in the ordinary course they would have worked. It would not, however, have been possible for them within the time of their lease to have worked out all the coal lying under the lands leased to them, and the effect of the requirement of the railway company was to cause the coal company to get other coal from under such lands at an increased cost:—

Held, that the proper measure of compensation to the coal company and to the reversioners was the profit which they would respectively have made on the coal which was by the requirement of the railway company left unworked, and not the injury which they respectively suffered by the interference with the working of the coal under the demised lands.

AWARD stated by an arbitrator in the form of a special case.

By the North Eastern Railway Act, 1887, the railway company were authorized to make and maintain a railway upon certain

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lands in the county of Durham, of which the predecessors in title of S. A. D. Eden were then seised for an estate for life. Messrs. James Joicey & Co., Limited (hereinafter called the coal company), were by virtue of a lease dated February 6, 1886, entitled to hold and to win, work, and carry away all the coal within and under the said lands for a term of twenty-one years from January 1, 1886.

The Act incorporated, inter alia, the Railways Clauses Consolidation Act, 1845; and the railway company duly took a portion of the said lands and constructed a railway thereon.

On August 11, 1892, the coal company being then desirous of working the coal under or within the prescribed distance from three several bridges forming part of the said railway, duly gave notice to the railway company, in conformity with s. 78 of the Railways Clauses Consolidation Act, 1845 (1); and the railway company, on November 2, 1892, by notice required the coal company to leave certain percentages of coal unworked as mentioned in the said notice for the support of the said railway (thereinafter called "the reserved coal"), and expressed their willingness to pay to the parties entitled thereto all such compensation as might be payable according to law.

At the dates at which the right to such compensation accrued the reversion expectant on the determination of the said lease (hereinafter referred to as "the said reversion") was vested in the said S. A. D. Eden as owner in fee, and he and the coal

(1) By the Railways Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 20), s. 78: "If the owner, lessee, or occupier of any mines or minerals lying under the railway, or any of the works connected therewith, or within the prescribed distance, or, where no distance shall be prescribed, forty yards therefrom, be desirous of working the same, such owner, lessee, or occupier shall give to the company notice in writing of his intention so to do thirty days before the commencement of working; and upon the receipt of such notice it shall be lawful for the company to cause such mines to be inspected by any person appointed by them for the purpose; and if it appear to the company that the working of such mines or minerals is likely to damage the works of the railway, and if the company be willing to make compensation for such mines or any part thereof to such owner, lessee, or occupier thereof, then he shall not work or get the same; and if the company, and such owner, lessee, or occupier, do not agree as to the amount of such compensation, the same shall be settled as in other cases of disputed compensation."

company, according to their respective interests, claimed compensation from the railway company for the reserved coal.

S. A. D. Eden died on July 15, 1904, and the claimants were his executors.

The quantity of the reserved coal is 6156 tons, and forms part of a seam called the Shield Row seam.

If the reserved coal had not been required to be left unworked, it would in the ordinary way and regular course of working have been worked by the coal company at various dates previous to December 31, 1903, and the coal company would have made out of the working of such coal a profit of 730*l.*, and the said S. A. D. Eden would also have received as rent in respect thereof the sum of 155*l.*

The special case proceeded in the following terms:—

"11. The average annual quantity of coal produced by the coal company out of the said seam continued unaltered until about the month of May, 1894, but since that month the output has been sensibly diminished. A diminution of output would have occurred in the ordinary course even if the reserved coal had not been required by the railway company to be left unworked, but the effect of the leaving unworked of the reserved coal has been to accelerate such diminution, and also to accelerate the time when it became necessary for the coal company in the ordinary prosecution of their workings to work coal more expensive to get. It is admitted that the effect of such acceleration has been to subject the coal company to increased expenses and loss, and for the purposes of this case these are agreed at 100*l.* There is left unworked in the said Shield Row seam under the said lands a quantity of coal which the coal company will not in the ordinary course be able to exhaust within the term of the before-mentioned lease, which expires January 1, 1907.

"12. Under these circumstances the railway company contend that the coal company have only suffered loss to the extent of 100*l.*, and that this amount, and no more, is the compensation to which the coal company are entitled in respect of the reserved coal having been left by them in conformity with the requirements of the railway company.

"13. The coal company, on the other hand, contend that the

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proper measure of compensation which they are entitled to receive from the railway company is the amount of money which it is admitted that they would have made by the working of the reserved coal if such coal had not been required by the railway company to be left unworked, viz., the above-mentioned sum of 730*l.*

"14. The railway company admit that the persons entitled to the said reversion are entitled to compensation in consequence of the service of the said notice of November 2, 1892; but they contend that the measure of such compensation is not the rent which the said S. A. D. Eden would have received in respect of the reserved coal if it had been worked, but the diminution in the value of the said reversion at the date of the service of the said notice in consequence of such service, that is to say, the difference between what would have been the value of the said reversion on November 2, 1892, had the said notice not been served and the value of the said reversion immediately after the service of the said notice.

"15. It is admitted by all parties that if the contention of the coal company set out in paragraph 13 is well founded, the executors of the said S. A. D. Eden are entitled to receive the sum of 155*l.* and no more (being the rent of royalty which would have been payable by the coal company to the said S. A. D. Eden in his lifetime in respect of the reserved coal, if that coal had been worked by them), and that nothing is payable to the other persons interested in the said revision.

"16. If the contentions of the railway company as set out in paragraph 14 are well founded, the compensation payable in respect of the lessors' interest is for the purposes of this case agreed at 310*l.*, but it is a question to whom such compensation ought to be paid.

"17. If the Court should be of opinion that the contention of the coal company set out in paragraph 13 is well founded, then I award that the railway company shall pay to them the sum of 730*l.* and shall pay to the said executors the sum of 155*l.*

"18. If, on the other hand, the Court should be of opinion that the contentions of the railway company set out in paragraphs

12 and 14 are correct, then I award that the railway company shall pay to the coal company the sum of 100*l.* and that the railway company shall pay to the persons interested in the said reversion the sum of 310*l.*; and I submit to the Court whether such compensation is payable to the said executors or to the tenant for life, or to the trustees of the estates settled by the will of the said S. A. D. Eden as capital moneys."

C. A. Russell, K.C., and *W. D. Benson*, for the claimants. The railway company must under s. 78 pay compensation for "such mines." The claimants are, therefore, entitled to receive the amount which they would have got had they been able to bring the reserved coal to the surface: *Bwllfa and Merthyr Dare Steam Collieries* v. *Pontypridd Waterworks Co.* (1) The section contemplates the value of the coal which the owners are prevented from working, and does not contemplate damages for the interference with these operations: *Smith* v. *Great Western Ry. Co.* (2)

Cripps, K.C. (*Ryde* with him), for the respondents. This case differs from the cases which have been cited, because it is found here that the lessees could not in the time of their lease have worked out all the coal under the lands leased to them. The effect, therefore, of their being prevented from working the reserved coal was to send them to work other coal at an increased cost, and they are no doubt entitled to be compensated for that increased cost. On the other hand, the owners of the reversion on the lease are damnified to a greater extent than the mere loss of the royalties on the reserved coal. When the land comes back to them on the expiration of the lease, there will not only be the reserved coal upon it which they cannot work, but an amount of coal will have been taken by the lessees which they would not have reached in the ordinary course if they had been able to work out the reserved coal. The reversioners are therefore entitled to be compensated for this injury to their reversion. The section does not contemplate an out-and-out purchase of the coal. There is only an embargo on the reserved coal, which might be removed if the line was no longer needed by the railway company: *Great*

(1) [1903] A. C. 426. (2) (1877) 3 App. Cas. 165.

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Northern Ry. Co. v. *Inland Revenue Commissioners.* (1) The result of the claimants' contention would be that the coal company would make a profit by the railway company requiring the reserved coal, as they would get the value of the reserved coal plus the value of the coal which they have brought to the surface in lieu of reserved coal.

BIGHAM J. This case is one of difficulty, but I do not think that it would be of any advantage if I were to take time to consider my judgment.

The question that I have to decide turns on the meaning of the words of s. 78 of the Railways Clauses Consolidation Act, 1845. [The learned judge read the section and continued :—]

Now, what is it which the railway company are to pay for? They are to be willing to make compensation "for such mines," that is to say, in this case, for the coal which the coal owner is precluded from working by reason of the railway company having given him notice not to work it.

The section does not say that the owner of the mine is to be compensated for the loss which he may suffer by reason of the interference of the railway company with the working of the mine; if it did, I think there would be a good deal to be said for Mr. Cripps' contention that all the surrounding circumstances must be looked at. But those are not the words of the Act. He is to be paid for the coal which he is prevented by the action of the railway company from bringing to the surface. I must therefore find in favour of the claimants and direct that the railway company shall pay to Messrs. James Joicey & Co. the sum of 730*l.* and to the executors the sum of 155*l.*

Judgment for the claimants.

Solicitors for claimants: *Rawle & Johnstone, for Cooper & Goodger, Newcastle-upon-Tyne.*

Solicitors for respondents: *A. Kaye Butterworth, York.*

(1) [1899] 2 Q. B. 652; [1901] 1 K. B. 416.

A. P. P. K.

[CROWN CASE RESERVED.]

THE KING *v.* BARRACLOUGH.

1905
Nov. 9.

Criminal Law—Indictment—Obscene Libel—Indictment for Defamatory Libel containing Obscene Matter—Deposit of Document containing alleged Libel—Exhibit to Depositions—Law of Libel Amendment Act, 1888 (51 & 52 *Vict.* c. 64), *s.* 7.

An indictment for publishing a libel, which was bad as a charge of publishing a defamatory libel for not setting out the passages relied upon (see *Bradlaugh* v. *Reg.*, (1878) 3 Q. B. D. 607), contained an averment that the defendant "unlawfully . . . . did . . . . publish . . . . a . . . . libel . . . . in the form of a document . . . . which said document . . . . contains divers . . . . obscene . . . . matters and things."

The judge at the trial held that this amounted to an indictment for an obscene libel, and the prisoner was convicted:—

Held, that although it would have been better for the indictment to have followed the old forms, and to have averred that the tendency of the obscene matter was to corrupt the public morals, and that the libel had been published with that intent, the conviction might under the circumstances be upheld.

It is not necessary, in order to satisfy the provisions of s. 7 of the Law of Libel Amendment Act, 1888—which provides that the obscene matter need not be set out in the indictment but that it shall be sufficient to deposit the document "containing the alleged libel with the indictment or other judicial proceeding"—that the incriminated document should be handed in with the bill of indictment, if it is already in the custody of the clerk of assize as an exhibit attached to the depositions.

Case stated by Jelf J. for the opinion of the Court for Consideration of Crown Cases Reserved.

"William Barraclough was arraigned before me at the Leeds Assizes on the 3rd August, 1905, and called upon to plead to the following indictment:

'Yorkshire West Riding to wit. } The jurors for our Lord the King upon their oath present that William Barraclough contriving and unlawfully and maliciously intending to injure, vilify and prejudice one Edith Woodhead, and to deprive her of her good name, fame, credit and reputation, and to cause her to be esteemed as a person of depraved and incontinent behaviour, and to bring her into public contempt, scandal, infamy and disgrace, on the 3rd day of November, A.D. 1904,

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unlawfully, wickedly and maliciously did write, print and publish and cause and procure to be written, printed and published to one Edward Harry Mond, a false, scandalous, malicious and defamatory libel in the form of a typewritten document, purporting to be extracts from a diary kept by the said William Barraclough, which said document was entitled, "Extracts from the Diary of the Rejected One," and contains divers lewd, wicked, scandalous, obscene, false, malicious and defamatory matters and things of and concerning the same Edith Woodhead and of and concerning certain wicked, unchaste and immoral practices of which he the said William Barraclough alleged the said Edith Woodhead had been guilty with him, to the great damage, scandal and disgrace of the said Edith Woodhead, to the evil example of all others in the like case offending and against the peace of our Lord the King his Crown and Dignity.

Second Count. And the jurors aforesaid upon their oath aforesaid do further present that the said William Barraclough contriving and intending as aforesaid on the said 3rd day of November, A.D. 1904, unlawfully, wickedly and maliciously did write, print and publish, and cause and procure to be written, printed and published to the said Edward Harry Mond a false, scandalous and defamatory libel in the form aforesaid, containing the defamatory matters aforesaid of and concerning the said Edith Woodhead and of and concerning certain wicked, unchaste, and immoral practices of which he the said William Barraclough alleged the said Edith Woodhead had been guilty with him, he the said William Barraclough then well knowing the said defamatory libel to be false, contrary to the statute in that case made and provided, and to the great damage, scandal and disgrace of the said Edith Woodhead to the evil example of all others in the like case offending and against the peace of our Lord the King his Crown and Dignity.

Third Count. And the jurors aforesaid upon their oath aforesaid do further present that the said William Barraclough contriving and intending as aforesaid on the 21st day of December, A.D. 1904, unlawfully, wickedly and maliciously did write, print and publish, and cause and procure to be written, printed and published to one Hedley Nichols Fowler a false, scandalous,

malicious and defamatory libel in the form and containing the obscene matters aforesaid concerning the said Edith Woodhead and of and concerning her alleged immoral practices aforesaid, to the great damage, scandal and disgrace of the said Edith Woodhead, to the evil example of all others in the like case offending and against the peace of our Lord the King his Crown and Dignity.

Fourth Count. And the jurors aforesaid, upon their oath aforesaid, do further present that the said William Barraclough, contriving and intending as aforesaid on the said 21st day of December, A.D. 1904, unlawfully, wickedly and maliciously did write, print and publish, and cause and procure to be written, printed and published to the said Hedley Nichols Fowler a false, scandalous, malicious and defamatory libel in the form aforesaid, containing the defamatory matters aforesaid, of and concerning the said Edith Woodhead and of and concerning certain wicked unchaste and immoral practices, of which he the said William Barraclough alleged the said Edith Woodhead had been guilty with him, he the said William Barraclough then well knowing the said defamatory libel to be false, contrary to the statute in that case made and provided, and to the great damage scandal and disgrace of the said Edith Woodhead, to the evil example of all others in the like case offending and against the peace of our Lord the King his Crown and Dignity.'

Before the defendant pleaded, his counsel objected that the whole indictment was bad, and ought to be quashed upon some one or more of the following grounds:—

First Objection. That the defendant was committed for trial only on a charge of publishing a defamatory libel, and that under the Vexatious Indictments Act no indictment or count could be preferred or added against him for publishing an obscene libel without the previous leave of the Court, which had not been obtained.

Answer. I overruled this objection on the ground that, in my opinion, the depositions disclosed a case of obscene libel, and therefore no previous leave was required (see 30 & 31 Vict. c. 35, s. 1).

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Second Objection. That, so far as the indictment purported to charge the publication of a defamatory libel, it was bad for not setting out the words of the alleged libel: see *Bradlaugh* v. *Reg.* (1)

Answer. I upheld this objection, and held that, as a charge of defamatory libel, the indictment failed.

Third Objection. That the manifest intention of the framer of the indictment was to charge the publication of a defamatory libel, and not of an obscene libel (as to which latter, subject to certain conditions to be mentioned presently, the obscene passages need not be set out since the Law of Libel Amendment Act, 1888 (51 & 52 Vict. c. 64), s. 7), and as the defamatory libel failed, the indictment failed altogether, and could not be construed as a charge of obscene libel, the words relating to obscene matter being merely descriptive of the defamatory libel, and that the indictment was also bad for duplicity.

Answer. I overruled this objection, as to the first and third counts, on the ground that the words apparently relating to a defamatory libel, but abortive for the purpose, under the second objection could be treated as surplusage, and could and should, if necessary, be struck out, and that the residue of each of the first and third counts, by alleging the publication of a libel containing obscene matter, sufficiently alleged the common law offence of publishing an obscene libel.

I ordered the second and fourth counts, which contained no reference to obscene matter, to be struck out.

Fourth Objection. That if any count of the indictment could be construed as alleging an obscene libel, it was bad by reason of the omission of the words "to the manifest corruption of the morals of his Majesty's subjects," which was the gist of the offence.

Answer. I overruled this objection, holding that an obscene libel ex vi terminorum connotes that it is to the manifest corruption of morals.

Fifth Objection. That the conditions of the aforesaid Act of 1888 (51 & 52 Vict. c. 64), s. 7, allowing on certain conditions

(1) (1878) 3 Q. B. D. 607.

the omission of the obscene passages of an obscene libel, had not been complied with, and therefore that *Bradlaugh* v. *Reg.* (1) applied, and the indictment was bad. (2)

As to this objection, the facts, so far as they appeared before the Court, were as follows:—

The depositions together with the original exhibits, including the document referred to in the first and third counts of the indictment entitled "Extracts from the Diary of the Rejected One," were sent as usual some time before the Assizes by the Clerk to the Justices to the Clerk of Assize, and were by him forwarded some days before the Assizes to me as judge, and remained in my hands up to the time of the defendant being arraigned as aforesaid, and were in Court before me at that time and could and would have been handed to the defendant or his counsel on his or their request. These documents are of too filthy and voluminous a nature to be set out in this case, or in a schedule thereto, but they are in the custody of the Court, initialled by me and marked A. and B., and can be seen by any member of the Court or by the defendant or his counsel if required.

The indictment itself was drawn by counsel and was handed on the morning of the first business day of the Assizes by the solicitor for the prosecution to the Clerk of Assize, engrossed and ready to go before the Grand Jury, but without any intimation that any other documents had to be attached to it.

At the same time there was handed as usual by the said solicitor to the Clerk of Assize an abstract of the indictment

(1) 3 Q. B. D. 607.

(2) By the Law of Libel Amendment Act, 1888 (51 & 52 Vict. c. 64), s. 7: "It shall not be necessary to set out in any indictment or other judicial proceeding instituted against the publisher of any obscene libel the obscene passages, but it shall be sufficient to deposit the book, newspaper, or other documents containing the alleged libel with the indictment or other judicial proceeding, together with particulars shewing precisely by reference to pages, columns, and lines in what part of the book, newspaper, or other document the alleged libel is to be found, and such particulars shall be deemed to form part of the record, and all proceedings may be taken thereon as though the passages complained of had been set out in the indictment or judicial proceeding."

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for the judge's use, to which was pinned a paper containing the following particulars:—

R. v. *William Barraclough.*

Particulars of Obscene Libels.

51 & 52 Vict. c. 64, s. 7.

Count 1 of Indictment, The entire Publication.

Count 2 of Indictment, The entire Publication.

Count 3 of Indictment, The entire Publication.

Count 4 of Indictment, The entire Publication.

These particulars as well as the said indictment and the said exhibits were all before me in Court at the time when the defendant was arraigned and when the said objections were taken, and all three could and would have been produced to the defendant or his counsel on request.

The indictment had been sent up in the usual way.

Nothing had occurred to call the attention of the Clerk of Assize or of the Court to the necessity or desirability of dealing with the indictment in any special manner till this objection was taken in Court as aforesaid.

Answer. I overruled this objection also, and held for the purposes of the day that there had been a sufficient deposit with the indictment of the said documents containing the alleged obscene libel, together with the said particulars, to satisfy s. 7 of the Act of 1888 (51 & 52 Vict. c. 64).

No separate point was taken that the particulars were in themselves insufficient, but I had considered this question, and was prepared to hold, and if the point is open to the defendant under the fifth objection, must be taken to have held, that inasmuch as every passage in the said documents containing the libel was a repetition of the obscene matter, the particulars were sufficient.

While overruling all the above objections, I promised to state a case for the opinion of the Court for the Consideration of Crown Cases Reserved, and I state this case accordingly.

The defendant thereupon pleaded "Not guilty" to the remaining (first and third) counts of the said indictment.

Counsel for the defendant then formally repeated the objections which had been so overruled as aforesaid, and I again overruled them on the same grounds as before.

The trial then proceeded, and it was proved that the defendant, who was an assistant overseer, and held other public offices at Farnley, had published to the men mentioned in the first and third counts of the indictment, who were courting, or intending to court, the girl mentioned in the indictment, to whom he had been for some years engaged to be married, and to herself, copies of the said alleged "Diary of the Rejected One," as well as the following printed postcards, addressed to her and them and others:—

"The Barraclough-Woodhead Diary. The most up-to-date Arabian Nights Entertainment extant, at the Reception by John Bull & Co.," and that this was done by him in pursuance of a threat that if she did not marry him he would make her a whore.

Counsel for the defendant watched the case to the end, but did not cross-examine any of the witnesses, or raise any defence on the merits.

I left the case to the jury to say whether the defendant had published an obscene libel, explaining to them the meaning thereof.

The jury found the defendant guilty, and I sentenced him to a year's imprisonment, but respited the sentence till after the decision of this case, admitting him to bail in the meanwhile.

I desire the opinion of the Court whether I was right in refusing to quash the first and third counts of the indictment on any of the grounds above mentioned.

If so, the conviction is to stand, if not, it is to be quashed.

A. R. JELF."

Tindal Atkinson, K.C. (*C. F. Palmer* with him), for the prisoner. The conviction cannot be sustained. The indictment was drawn as an indictment for defamatory libel, and it cannot be turned into an indictment for obscene libel when it fails as an indictment for defamatory libel. The offences of defamatory libel and obscene libel are entirely different. Defamatory libel is an offence against an individual, and is only incidentally criminal as it may produce a breach of the peace. The very essence of an obscene libel is that it is an offence

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against the public as tending to corrupt public morals. Obscene libel is a common law offence with no statutory punishment, whereas defamatory libel has a statutory punishment. The two offences cannot be charged in the same count, and if they are, the count is bad for duplicity. It is clear, however, that the intention of the draftsman of the indictment was to charge a defamatory libel in counts one and three, and the word "obscene" is only descriptive of the matter contained in the alleged libel. The words relating to a defamatory libel cannot therefore be rejected as surplusage, as they are in fact the gist of the count.

Assuming, however, that the count charges, and was intended to charge, an obscene libel, it is insufficient. It is an essential part of the offence of publishing an obscene libel that it should have a tendency to corrupt, and should have been published with the intention of corrupting, the public morals, and the indictment must contain an averment to this effect: Archbold's Criminal Pleading, 23rd ed. p. 1190. In *Reg.* v. *Hicklin* (1) Cockburn C.J. says: "The test of obscenity is this, whether the tendency of the matter charged as obscenity is to deprave and corrupt those whose minds are open to such immoral influences." The mere allegation that the matter published is obscene is insufficient without an averment of its tendency to corrupt public morals.

[WALTON J. In Stephen's Digest of the Criminal Law, 6th ed. p. 134, it is submitted, "A person is justified in . . . . publishing obscene books, papers, writings, &c. . . . . if their . . . . publication is for the public good, as being necessary or advantageous to religion or morality, &c."]

No doubt the intention of the publication and the tendency of the matter published may be inferred from the character of the work, and the form and circumstances of the publication, but it is insufficient to allege the matter to be obscene without any further averment. The word "obscene" is not of itself descriptive of the tendency to corrupt public morality.

If, however, counts one and three do amount to a sufficient charge of the publication of an obscene libel, the indictment is bad for non-compliance with s. 7 of the Law of Libel Amendment

(1) (1868) L. R. 3 Q. B. 360, at p. 371.

Act, 1888. That section was enacted in consequence of the decision in *Bradlaugh* v. *Reg.* (1), and provided that it should not be necessary to set out the obscene passages in an indictment, "but it shall be sufficient to deposit the book, newspaper, or other documents containing the alleged libel, with the indictment or other judicial proceeding, together with particulars shewing precisely by reference to pages, columns and lines in what part of the book, newspaper, or other document the alleged libel is to be found." Here the alleged libel was a mere exhibit to the depositions, and was not deposited with the indictment and particulars. Although the incriminated document was in the custody of the clerk of assize it did not form part of the indictment, and a copy of it should have been deposited with the indictment.

[The point as to the Vexatious Indictments Act was not pressed.]

Waugh, *K.C.* (*Compston* with him), for the prosecution.

[LORD ALVERSTONE C.J. We only desire to hear you as to the sufficiency of the indictment.]

It is a criminal offence to publish unlawfully obscene matter. The gist of the offence is the unlawfulness of the publication. If the matter published is obscene there is an inference of law that its tendency is to corrupt public morals, and there is no necessity to aver it in the indictment. The point is really decided by *Reg.* v. *Hicklin* (2), where Cockburn C.J. said (3): "I hold that where a man publishes a work manifestly obscene, he must be taken to have had the intention which is implied from that act."

LORD ALVERSTONE C.J. In this case my brother Jelf was put in a very difficult position by the form of the indictment. There is no doubt that an indictment for obscene libel should be so drawn as to include the ordinary averment as to the libel being to the prejudice of public morals. The form of indictment for an obscene libel given in Archbold's Criminal Pleading contains the allegation that the defendant, "devising,

(1) 3 Q. B. D. 607. (2) L. R. 3 Q. B. 360.
(3) L. R. 3 Q. B. p. 373.

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contriving and intending the morals as well of youth as of divers other liege subjects of our lord the King to debauch and corrupt and to raise and create in their minds inordinate and lustful desires," published the libel "to the manifest corruption of the morals as well of youth as of other liege subjects of our said lord the King," and although it is not necessary to follow those precise words, I think there is no doubt that the indictment should contain an allegation that the intention of the libel was to corrupt public morals. But what we have to consider is whether the judge was right in saying that having regard to the objections taken on behalf of the prisoner there was sufficient averment left in the counts one and three to justify those counts in being treated as charging an obscene libel and therefore to support this conviction. Counts two and four of the indictment were withdrawn from the consideration of the jury, but my brother Jelf held that there was sufficient in counts one and three to amount to a charge of obscene libel. He did not as a fact quash any part of either of those counts, but he thought the unnecessary words might be treated as surplusage and that the counts contained sufficient allegation of a charge of publishing an obscene libel to justify the conviction. The indictment alleges that the defendant "unlawfully and maliciously" published a libel in the form of a typewritten document, "which said document . . . . contains divers . . . . obscene . . . . matters and things" concerning Edith Woodhead.

As I have said, I think that in order to prevent any point of this kind from being taken it is better that the old practice should be followed, and that the indictment should contain an averment that the libel was published with the intention of corrupting the public morals. But we have here to consider this indictment, and reading it together with the typewritten document to which it refers, I do not think that these counts could be withdrawn from the jury as though the only charge contained in them was that of a defamatory libel. The indictment contains a distinct allegation of the unlawful publication of an obscene libel, and that is, in my opinion, sufficient to support the conviction. This is not a case in which it is necessary for the indictment to negative possible defences, such, for example, as the

defence that the document was published for the public benefit. The document itself was in the possession of the Court, and in my opinion the judge would have been wrong if he had not allowed the case to go to the jury. Assuming that the words of that typewritten document had been set out in the indictment, then, taking with that the allegation that the publication was unlawful, how could he possibly have withdrawn the case from the jury merely because there was no averment that the publication of such details was likely to corrupt the morals of the public? I think Cockburn C.J., in *Reg.* v. *Hicklin* (1), clearly supports the view I am taking when he says (2): "The test of obscenity is this, whether the tendency of the matter charged as obscenity is to deprave and corrupt those whose minds are open to such immoral influences."

In my opinion my brother Jelf was right. Only one offence is alleged, that of unlawful publication, and there was the allegation that the matter published was obscene, and that seems to me sufficient in this case to support the conviction.

On the other point also I have no doubt whatever. The object of s. 7 of the Law of Libel Amendment Act, 1888, was to make it unnecessary to set out in the indictment the words complained of, and the section says, "it shall be sufficient to deposit the book, newspaper, or other documents containing the alleged libel with the indictment or other judicial proceeding." Looking at the ordinary practice where there is a charge of obscene libel, the incriminated document is put before the magistrates and is annexed to the depositions (as was done here), and forms part of them. It then is in the legal custody of the magistrates' clerk and is sent by him to the clerk of assize, in whose custody it remains, and is at the disposal of the judge, the grand jury and counsel. I asked Mr. Tindal Atkinson what other deposit of the document there could be, and he was unable to say. Here the bill of indictment (for it is not an indictment until a true bill is found by the grand jury) is deposited with the clerk of assize, in whose custody the incriminated typewritten document already is, and annexed to the bill of indictment are particulars shewing what parts of that document

(1) L. R. 3 Q. B. 360. (2) L. R. 3 Q. B. p. 371.

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already in the custody of the clerk of the assize are relied upon as being obscene libels. The statute says nothing as to the manner in which the deposit is to be made. The Legislature knew that the book or document would be in the custody of the law, and I think that the words in s. 7, "with the indictment or other judicial proceeding," were inserted because it was known that when the indictment was presented the book or document would be in the custody of the clerk of assize.

No doubt there must in the indictment be a clear and distinct reference to the deposited document, but that is so here, and it is clear that every line of this typewritten document was an obscene libel. I think, therefore, that there has been a compliance with the requirements of s. 7 and that the conviction must be affirmed.

WILLS J. I am of the same opinion and have nothing to add.

DARLING J. I am of the same opinion. It seems to me that if a thing which is properly called obscene is alleged to be unlawfully published, it follows that all the usual allegations in an indictment for obscene libel are included. Even in such an indictment as this, intent is, I think, part of the indictment. It is no doubt *sous-entendu* and not set out with the wearisome reiteration to which we are accustomed in indictments, but it is still part of the charge or the publication would not have been unlawful.

No doubt it would be better to allege the intent to corrupt the public morality in the words usually found in such indictments, because it amounts to a notice to the defendant of the charge against him, and because also of the case of *Reg.* v. *Thomson*. (1) In that case there was an indictment for publishing an obscene libel, and evidence was tendered by the prosecution to shew that other books of an indecent and obscene character were found on the defendant's premises. This evidence was objected to, and the Common Serjeant (Mr. Bosanquet), for whose opinion I entertain a very high respect, said: "Whilst the question of the intention with which the book was sold is part of the indictment, it is impossible to say that the holding out and offering other books may not

(1) (1900) 64 J. P. 456.

bear on that intent. If the defendant sold other books whose titles go to suggest that they are indecent, it is some evidence to shew that she sold this book with the intention alleged in the indictment, and not accidentally. I cannot exclude the evidence."

It seems, therefore, desirable that the intent should be expressly averred in the indictment, as, if it is not, in such a case as *Reg.* v. *Thomson* (1), and similar evidence were tendered, it might well be that it would be excluded by the judge, which would be regrettable.

However, in this case I think the indictment is sufficient to support the conviction.

WALTON J. I have felt some doubt as to the sufficiency of this indictment, but on the whole I have come to the conclusion that since it charges that the publication was unlawful and that the matter published was obscene, it is sufficient. The defendant on a plea of not guilty could negative either of those allegations and could shew either that the publication was justifiable or that the matter published was not improper. I agree, therefore, that the conviction must be upheld.

JELF J. I agree with the rest of the Court.

Conviction affirmed.

Solicitors for prisoner: *Scott-Lawson & Palmer, for Arthur Willey, Leeds.*

Solicitors for prosecution: *Peckover & Scriven, Leeds.*

(1) 64 J. P. 456.

A. P. P. K.

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Dec. 14.

DAVIES, Appellant *v.* SEISDON UNION, Respondents.

Poor Rate—Assessment—Sewage Farm.

A sewerage board, being under a statutory obligation to dispose of the sewage of a district, acquired for the purpose a farm, on which they laid pipes and constructed channels for the distribution of the sewage. This farm they let to a tenant as a sewage farm. The rent reserved by the lease was a fair rent for the farm as agricultural land including the manurial value of the sewage :—

Held, that under the circumstances the reserved rent represented the true value of the farm for rating purposes, and that the rating authority when assessing its value were not entitled to take into account the benefit accruing to the sewerage board from the farm as a means of enabling them to discharge their statutory duties, notwithstanding that it was a benefit for which, if they had had to lease land for the purpose, they would have had to pay a rent.

Case stated by the quarter sessions for the county of Stafford.

Upon the hearing of an appeal by the quarter sessions against a poor rate made on May 2, 1904, whereby the appellant was rated in respect of certain hereditaments in the occupation of the appellant in the parish of Kinver, in the Seisdon Union, known as the Whittington Hall Farm, and consisting of land, house, buildings, sewerage works and plant, it was ordered that the gross estimated rental of the farm should be assessed at 479*l.*, the rateable value of the agricultural land at 380*l.*, and the rateable value of the buildings and other hereditaments, not being agricultural land, at 46*l.*, subject to the following case for the opinion of the Court.

The Whittington Hall Farm and the houses, buildings, and sewerage works thereon (except a small portion of land in the parish of Wolverley, rated at a rateable value of 2*l.* 15*s.*) are situated within the parish of Kinver, and belong to the Upper Stour Valley Main Sewerage Board, which is a sewerage board duly constituted by statute for the purpose of dealing with the sewage of a certain district situate outside the parish of Kinver and the Seisdon Union. For the purposes of carrying out the duties imposed upon them the said sewerage board acquired the Whittington Hall Farm, which farm is let in the manner hereinafter mentioned to the appellant Davies. After the farm was so

acquired it was converted by the sewerage board into a sewage farm for the purpose of dealing with the sewage of the said district, and for this purpose they laid down and constructed upon the farm carriers, distributors, catchpits and sluices, consisting of brick or pipe channels and appliances. The said plant was constructed under and upon the surface of the farm for carrying the sewage from the mains of the sewerage board to suitable places and disposing thereof on the farm. The sewage brought to the farm by the board is distributed upon the farm by means of the said plant, and is there dealt with by the system known as the broad irrigation system. The sewerage board have spent in laying down and equipping the said plant and in making roads on the farm (in addition to the cost of the farm) the sum of 8962*l.*, or thereabouts. They were able to borrow the money at the rate of $3\frac{1}{4}$ per cent. per annum.

The Whittington Hall Farm contains about 435 acres, and has been let to the appellant by the sewerage board and the former owners for many years. By a lease under seal dated March 16, 1903, the Upper Stour Valley Main Sewerage Board, in consideration of the rent and covenants therein reserved and contained, and on the part of the lessee to be paid, observed and performed, demised to Edward Davies the Whittington Hall Farm for the term of one year at the rent of 460*l.* The tenant thereby covenanted that he would cultivate the land demised as a sewage irrigation farm and would utilize all the sewage during the tenancy delivered thereon by the board, so that the sewage might be freed from noxious matter and purified by application to the land in such a manner that it might properly be discharged by the lessee into any stream without breach of the law, and would at all times during the term receive and distribute on the land and through a sufficient portion thereof all the sewage which should be delivered on the land by the board, and would keep the board indemnified against all claims and demands made against the board on account of any nuisance caused by the sewage from the time it came upon the land until it was discharged purified into some stream.

By an agreement dated February 27, 1904, the said rent was in March, 1904, increased to the sum of 490*l.* per annum, and

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subject to that variation the tenancy was continued upon the terms of the said lease so far as the same were applicable to a tenancy from year to year.

The sewerage board are duly rated in respect of the whole of their premises, mains, and works (used in dealing with their sewage) other than the said plant upon the farm.

The sewerage board were at one time rated in respect of the said plant, but on appeal to quarter sessions the rate was amended on the ground that the board were not in occupation of the plant, and that the plant was in the occupation of the tenant of the farm. In a subsequent rate the present appellant, as tenant of the farm, was rated separately for the plant under the heading "sewage works and plant" in the sums of 364*l.* gross estimated rental and 291*l.* 5*s.* rateable value as for "buildings and other hereditaments not being agricultural land." But on an appeal to the quarter sessions, which was by consent referred to Mr. A. T. Lawrence, K.C., as arbitrator, the said rate was ordered to be amended by striking out the assessment. The sewerage board during the tenancy of the appellant continue to discharge their sewage by means of the said plant on to the said farm, and thereby are enabled to perform their statutory duties. The rent payable under the lease was fixed after negotiation, and is a fair rent for the advantages which the appellant gets under the lease, including the value of the sewage. The rent is more than it would be if the appellant did not get the manurial value of the sewage.

It was contended for the respondents that to assess the appellant on the basis of the actual money paid under the lease was to treat the farm merely as an agricultural holding, and to leave out of account the fact that under the terms of the lease the appellant is bound to so use the farm and by and upon it to give such facilities to the sewerage board as to enable them to carry out their statutory duties, for which facilities they would be willing to pay; that the farm in the hands of the sewerage board would be equal in value to the money paid by the appellant plus the annual value of such facilities; and that in the hands of the tenant the value of the obligations imposed by the lease upon the tenant (which would equal the value of the facilities) must be

added to the actual money paid by the appellant for the purpose of arriving at the rateable value of the farm.

The justices held that the actual sum paid by the appellant was the true basis upon which the hereditaments should be rated, and that they ought not to take into account the annual value of the advantages and facilities accruing to the sewerage board in connection with the said plant, and they reduced the rate accordingly.

Alexander Glen, *K.C.*, and *Disturnal*, for the respondents. (1) The question is, what is the value of the land? The value of the land is one thing, the value of the tenant's occupation of it is another. The Court below confused the two together. In *Reg.* v. *Rhymney Ry. Co.* (2), where the owners of certain docks and wharves let the wharves to a railway company, who were the sole occupiers of the wharves, but by the agreement certain wharfage dues payable on goods shipped or unshipped at the wharves were reserved to the landlords, and were paid direct to them by the owners or consignees of the goods, it was held that the company were liable to be assessed to the poor rate in respect of the full rateable value of the premises, including the wharfage dues, without regard to the amount of the benefit which they themselves derived from the occupation. That case shews that what the landlord gets into his pocket is part of the rateable value over and above the value to the tenant of his occupation. The user of the land in the present case, as in the *Rhymney Case*, produces two classes of profit, the profit to the tenant as a farmer, and the profit to the sewerage board as a means of discharging their statutory obligations. The principal use of the land is as a place of deposit of the sewage. The use of it for the purposes of a sewage farm is purely incidental to the principal user. The justices took into consideration only the profit arising from the latter. Amongst the possible hypothetical tenants are the sewerage board themselves. Then what rent

(1) The expressions "respondents" and "appellant" are throughout this report used to designate the parties who were respectively the respondents and appellant before the quarter sessions.

(2) (1869) L. R. 4 Q. B. 276.

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would they be willing to pay if they did not own the land themselves, but had to rent it from a landlord who, in order to enable them to occupy it, constructed the sewerage plant for them? It is obvious that they would pay the agricultural rent plus a sufficient percentage on the cost of the works to recoup the landlord for his outlay. If the tenant were in possession of the land as a ready-made sewage farm under a lease from a third person, and the sewerage board were to offer to rent from the tenant the right of discharging their sewage on the farm, it is clear that if he were a free agent and not bound by any covenant to receive the sewage, he would not be content with the sewage as his only remuneration, for they would be willing to pay him a rent not far short of what it would cost them to go elsewhere and make similar sewage works themselves. Under those circumstances the rent which he could afford to pay to his landlord would be the agricultural value of the land in its manured condition plus the rent which he got from the board for disposing of their sewage for them. If the appellant's contention is right, the parish will lose the whole rateable value of the sewerage plant, which would be unjust. [He referred to *Leicester Corporation* v. *Beaumont Leys*. (1)]

W. Ryde, for the appellant, was not called upon.

LORD ALVERSTONE C.J. In my opinion the point which has been raised by Mr. Glen is one which has been negatived by many cases decided over a long period, and to adopt it would be to upset the principles of rating which have now been recognized certainly for a generation. The standard of value as fixed by the Act of 1836 is "the rent at which the same" (that is, the hereditament) "might reasonably be expected to let from year to year free of all usual tenants' rates and taxes and tithe commutation rent-charge, if any, and deducting therefrom the probable average annual cost of the repairs, insurance and other expenses, if any, necessary to maintain them in a state to command such rent." In this case it appears that the assessment committee first rated the sewerage board in respect of these mains and carriers, and on appeal the quarter sessions decided that they were

(1) (1894) 63 L. J (M.C.) 176.

no longer in occupation of them, and that therefore their lessee was the proper person to be rated. Thereupon the committee rated the lessee at 291*l.*, being the annual value of the buildings and hereditaments not agricultural land, which value represented the interest upon the capital cost of the sewerage plant. That was clearly not the right method of rating, although no doubt capital cost may under certain circumstances be taken into consideration. The matter was referred to Mr. A. T. Lawrence as arbitrator, and he very properly struck the assessment out. Then the committee appear to have said: "Although we cannot rate the board as occupiers of these mains and carriers, and although we cannot rate the tenant in respect of them, we shall ask to have exactly the same figure added on to the value of the agricultural land." I quite agree with Mr. Glen's contention that the rent reserved by the lease is in no way conclusive of the amount of the rent which the hypothetical tenant would be willing to pay. It is only evidence. And here it was quite open to the sessions to have found that the real value of the premises was the reserved rent plus the value of the service in receiving the sewage, and that consequently something ought to be added to the 490*l.* rent reserved by the lease. If they had said that, we should have no right to interfere. But what have they found? It is agreed that the rateable hereditament in the occupation of the tenant is not a pumping station nor a rising main, nor anything of that sort, but consists of carriers which carry the sewage about his fields, and through which he distributes it. Then what is the value to the hypothetical tenant, not this particular tenant who is in occupation, but the hypothetical tenant, of the right of enjoying the receipt of sewage through those carriers? I agree with Mr. Glen that among the possible hypothetical tenants is to be included the sewerage board, who might wish to make use of this particular opportunity of getting rid of their sewage. Where I part company with him is in his attempt to estimate the rental on a basis different from that which is laid down by the Parochial Assessment Act. Now what the sessions have said is this: "The sewerage board during the tenancy of the appellant" (that is, Mr. Davies) "continue to discharge their sewage by means of the said plant on to the said

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farm, and thereby are enabled to perform their statutory duties." It is not suggested that the tenant gets anything from the board for so permitting them to discharge their statutory duties. "The rent payable by the appellant under the said lease was fixed after negotiation, and is a fair rent for the advantages which the appellant gets under the said lease, including the value of the said sewage. The said rent is more than it would be if the appellant did not get the manurial value of the said sewage." I understand that to mean that, taking the rest of the agricultural land as x, 490*l.* represents x plus the sum which the hypothetical tenant would pay for getting the sewage through the carriers. The case then proceeds: "It was contended before us by the appellant that the hereditament must be assessed as it stands in the hands of the appellant, and that the rate must be made upon the basis of the rent which a tenant might reasonably be expected to give for the farm as a sewage farm, and that the best evidence of such rent was the actual rent which the appellant paid under the said lease"—that is only saying what has been frequently said by judges, that under ordinary circumstances the actual bargain is the best evidence—"and that the respondents ought not to include in the said assessment (as they have done) any sum which represented the annual value of the advantage to the said sewerage board (over and above the rent of the said farm) in respect of the facilities afforded to them by the user of the said farm as a sewage farm for the performance of their statutory duties." With that I entirely agree. Mr. Glen has cited in support of his contention the case of *Reg.* v. *Rhymney Ry. Co.* (1) But in my opinion that case is not in point. There the wharfage dues, in respect of which the liability to be rated was the matter in dispute, arose from the occupation of the land. And it was held that the hypothetical tenant must be assumed to receive them all, and that the fact that the real tenant only retained some in his own pocket, while the landlords received the rest, did not prevent the parish from having the benefit of the whole, a principle which has been recognized over and over again, and which is really the basis of the *Mersey Docks Cases.* (2) In my opinion the sessions have here applied

(1) L. R. 4 Q. B. 276. (2) (1865) 11 H. L. C. 443.

the proper test, and as far as questions of fact go, we have no right to interfere with them. The appeal must be dismissed.

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LAWRANCE and RIDLEY JJ. concurred.

Appeal dismissed.

Solicitors for the respondents: *H. Taylor, Wolverhampton.*

Solicitors for the appellant: *Dennison, Horne & Co., for G. Green, Cradley Heath.*

J. F. C.

MANSEL *v.* ITCHEN OVERSEERS.

1906 *Jan.* 12.

Poor Rate—Outgoing Occupier—Apportionment of Rate—Demand—Distress Warrant.

A poor rate having been made and duly demanded of a ratepayer, he subsequently during the currency of the half-year for which the rate was made went out of occupation, and thereby became liable to pay only so much of the rate as was proportionate to the time of his occupation. No fresh demand for a proportion of the rate was made upon him, but he neither paid nor tendered any portion of it. On a summons for non-payment of the rate the justices ascertained the proportion which was due and forthwith issued their distress warrant for that amount:—

Held, that they had jurisdiction to do so.

CASE stated by justices for the county of Southampton.

On October 18, 1904, a poor rate was made for the parish of Itchen for the half-year ending March, 1905, the appellant, O. L. Mansel, being rated in a sum of 9*l.* 7*s.* 3*d.* in respect of the occupation by him of a house and garden, land and buildings. The said sum of 9*l.* 7*s.* 3*d.* was duly demanded of him in the early part of November, 1904, and was not paid, and no further or other demand in respect of that rate was at any time made. The appellant, who had ceased to farm the land at Michaelmas, 1904, continued in visible occupation of it down to November 25, 1904, when his farm stock was sold by auction, but he remained in possession of the house and garden down to the end of March, 1905. On March 24, 1905, the appellant was summoned by the overseers for non-payment of a sum of 6*l.* 5*s.* 8*d.*, being the full amount of the rate for the house and garden, and the proportion

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of the rate for the land and buildings down to January 17, up to which date the overseers claimed that he had continued in occupation. The justices found that the appellant was in occupation of the land and buildings up to November 25, and that the amount due from him for the rate was 3*l.* 10*s.* 3*d.*, and they accordingly issued their distress warrant for that sum and costs. It was objected on behalf of the appellant that no demand of the precise sum found to be due had ever been made upon him and that consequently the justices had no jurisdiction to issue their distress warrant. But the justices overruled the objection subject to a case for the Court.

Emanuel, for the appellant. The party rated is entitled to a demand of the precise sum actually due for the poor rate before a distress warrant is issued: *Hurrell* v. *Wink* (1); *Morton* v. *Brammer*. (2) Under the Distress for Rates Act, 1849 (12 & 13 Vict. c. 14), the form of warrant (C. 1) in the Schedule thereto recites that "the said sum hath been duly demanded of the said A. B., but that he hath not paid and hath refused and still refuses to pay the same." There can be no refusal unless there is a demand, and a demand of a larger sum is no demand of the precise sum due.

J. A. Simon, for the respondents. The demand of the 9*l.* 7*s.* 3*d.* was a proper demand upon the face of the rate, and was the amount that was actually due at the date when the demand was made. When once a good demand has been made no further demand is necessary merely because the ratepayer happens to have gone out of occupation during the half-year for which the rate was made. If the appellant had paid as soon as the rate was demanded of him, as he ought to have done, he would have had to pay the whole 9*l.* 7*s.* 3*d.*, although he was going out of occupation before the end of the period. The cases relied upon for the appellant are not in point, for they were cases which had no reference to the position of a ratepayer who gives up occupation during the currency of the period for which the rate was made. The only foundation for the necessity of a demand at all before distress is to be found in the language of the

(1) (1818) 8 Taunt. 369. (2) (1860) 8 C. B. (N.S.) 791.

original Poor Relief Act of 1601 (43 Eliz. c. 2), s. 4, which empowers the overseers to levy the rate by distress "of every one that shall refuse to contribute according as they shall be assessed," it being impossible to treat mere non-payment as a "refusal" within that section unless there has been a previous demand. But the only demand which can be required is that of the amount to which "they shall be assessed," which is the whole amount of the rate appearing in the rate book. And the form of warrant of distress (C. 1) in the Schedule to 12 & 13 Vict. c. 14, is to the same effect, inasmuch as it states a finding by the justices that the rate was duly made and "that the said A. B. is therein and thereby assessed at the sum of aforesaid, and that the said sum"—that is, the whole amount of the rate—"hath been duly demanded of the said A. B. but that he hath not paid and hath refused and still refuses to pay the same," and then proceeds, "therefore these are to command you . . . . forthwith to make distress." The Poor Rate Assessment and Collection Act, 1869 (32 & 33 Vict. c. 41), s. 16, which in substance re-enacts the provisions of 17 Geo. 2, c. 38, s. 12, provides that a ratepayer who goes out of occupation during the period of the rate and is succeeded by an incoming occupier, shall be liable only "for so much and no more of the rate as is proportionate to the time of his occupation." And by the Poor Rate Assessment and Collection Act, 1882 (45 & 46 Vict. c. 20), s. 3, the same relief is extended to an outgoing occupier who is not succeeded by an incoming tenant, which was the case here. But neither of those statutes make any mention of the outgoing occupier's "refusal" to pay his proportion of the rate as a condition precedent to the issue of a distress warrant for that proportion. And for an obvious reason. The date at which the tenant goes out of occupation, and the amount by which he consequently is entitled to have the original rate reduced, is known to the tenant, but is not necessarily within the knowledge of the overseers. It is matter of defence to the overseers' claim for the full rate, and the onus of proof of it lies upon the ratepayer. That was apparently the view of Channell J. in *Davis* v. *Woodfield*.(1) Here the overseers found out that the appellant had given up possession of

(1) (1900) 64 J. P. 215.

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the land during the half-year and they accordingly reduced the claim somewhat and assessed it at 6*l.* 5*s.* 8*d.* But that figure was mere guesswork; they had no means of ascertaining the exact amount due, whereas the appellant did know and ought to have tendered that amount.

[LORD ALVERSTONE C.J. Ought not the justices in such a case as this to first ascertain the precise amount due and then leave the overseers to issue a fresh summons in the event of the ratepayer not paying that sum upon demand made?]

No; there is no injustice in their issuing their distress warrant immediately upon the ascertainment of the amount due. In an ordinary action where more is claimed on the writ than is found to be due by the jury execution may follow immediately upon the judgment without the necessity of any demand for the amount of the verdict. And so in the case of rates it is enough to satisfy the requirements of justice that a larger sum than that which is due should have been demanded, and subject to that condition execution by distress ought to be allowed to follow immediately upon the justices' decision as to the amount due.

Emanuel, in reply. Non-payment of a demand of 9*l.* 7*s.* 3*d.* is not a refusal to pay a sum of 3*l.* 10*s.* 3*d.* There must be a demand, not necessarily of the amount of the rate, but of the amount due on it. This is shewn by the 54 Geo. 3, c. 170, s. 12, which enacts that the goods of "any person neglecting or refusing to pay any sum or sums of money assessed on *and due from him* . . . . in respect of any rate for the relief of the poor . . . . for the space of seven days after *the same* shall have been legally demanded of him . . . . shall and may be distrained" outside the district where the rate was made. It is there made a condition precedent to the distress that the sum "due from him" shall have been demanded. Those words "due from him" are used in contrast to the words "assessed on him," and rightly so, for at the date when that Act was passed, the first Act which relieved an outgoing occupier from the obligation to pay more than a proportion of the rate, 17 Geo. 2, c. 38, s. 12, was already on the statute-book, and the Legislature consequently recognized in the Act of George III. that the amount which was due from the ratepayer and which ought to be demanded of him might be

something less than the whole amount of the rate. The justices here ought, after finding the amount due, to have dismissed the summons and left the overseers to proceed *de novo* upon a fresh demand of the smaller sum.

LORD ALVERSTONE C.J. The question in this case, which is one of some little difficulty, is whether upon a summons for non-payment of poor rates in Form B. in the Schedule to the Distress for Rates Act, 1849, it is competent for the justices not only to decide what is the amount due, but also, where the amount so found to be due is less than the whole amount of the rate, to issue forthwith their distress warrant for the amount so found.

It has been contended for the appellant that they cannot do so, but that they ought in such a case to find the amount due, but dismiss the summons and leave the overseers to make an amended demand upon the ratepayer. We ought not to uphold that contention unless we are compelled by the language of the statute or by decisions to do so. The original Poor Relief Act of Elizabeth contemplated the recovery of rates by distress warrant in the event of the ratepayer refusing to pay. Then a series of decisions under that statute, of which *Hurrell* v. *Wink* (1) is one, decided that as there could be no refusal without a demand, a demand of the rate was an essential preliminary to proceedings for a distress warrant. But in that case the effect of the statute 17 Geo. 2, c. 38, s. 12, was not considered by the Court, and no question appears to have arisen thereunder. The difficulty in the present case arises out of the later legislation. By s. 16 of the Poor Rate Assessment and Collection Act, 1869, which repeals and re-enacts in an amended form s. 12 of 17 Geo. 2, c. 38, it is provided that where there is a change of occupation in the middle of the period, the outgoing occupier shall be liable for so much of the rate only as is proportionate to the time of his occupation. And by the Poor Rate Assessment and Collection Act, 1882, the benefit of the former Act is extended to an outgoing occupier who is not succeeded by an incoming tenant. Here the demand which was made upon the appellant was for 9*l.* 7*s.* 3*d.*, which

(1) 8 Taunt. 369.

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was the whole amount of the rate; but as he had gone out of occupation during the period of the rate he was entitled to relief under the Act of 1882, and could be required to pay no more than his fair proportion. The question is, therefore, what ought the justices to do in such a case, upon a summons in Form B. in the Schedule of the Act of 1849, which alleges that the ratepayer "being a person duly rated and assessed to the relief of the poor . . . . in the sum of hath not paid the same or any part thereof, but hath refused so to do." Upon such a summons the justices have jurisdiction to determine the amount which is due from the party summoned. It is clear that they cannot issue a distress warrant to recover more than the amount so found to be due: *Davis* v. *Woodfield* (1); but I am of opinion that, having ascertained the amount due, they can proceed to give effect to their decision, and issue their distress warrant at once for the amount due. In my opinion we ought not to hold that their power is confined to making a declaratory order as to the amount without following it up with a warrant, but that they can make the same order with respect to the ascertained amount as they could have made with respect to the whole rate, had the whole rate been due. There is no hardship upon the ratepayer in this view, for he knew the exact date at which the occupation ceased, and the consequent proportion of the rate which was due from him, whereas the overseers probably did not.

RIDLEY J. I agree. It seems to be clear that before a warrant of distress can be issued there must have been a demand of the rate, and according to the decision in *Hurrell* v. *Wink* (2) it must be a demand of the precise sum due. The necessity of that demand probably arises from the language of the Act of Elizabeth, which provides that rates may be levied by distress "of every one that shall refuse to contribute according as they shall be assessed." In that case no question arose as to the ratepayer having gone out of occupation after the allowance of the rate, and the effect of the statute 17 Geo. 2, c. 38, s. 12, was not considered. Here the demand made upon the appellant

(1) 64 J. P. 215. (2) 8 Taunt. 369.

was for the whole amount at which he was rated, which was, moreover, the amount due from him at the date of the demand made, for at that date he had not yet given up possession of the land. So that as far as the Act of Elizabeth was concerned, the overseers had made the only demand that could be required of them. The difficulty in this case arises from the Acts of 1869 and 1882, which relieve an outgoing occupier from the liability to pay more of the rate than is proportionate to the time of his occupation. What the proper proportion is must, in case of dispute, be determined by the justices, and it is said that when that proportion has been so determined there must be a fresh demand of the proportion due before a distress warrant can be issued. With that contention I cannot agree. I think that as soon as the justices have ascertained the amount which is due they may issue their warrant forthwith for the recovery of that amount.

DARLING J. I am of the same opinion. The appellant here was in occupation of premises in respect of which he was duly rated in a sum of 9*l.* 7*s.* 3*d.*, and that sum was properly demanded of him at a time when it still remained due from him. Subsequently to that demand he went out of occupation of part of the premises. Under the old poor law, notwithstanding his cesser of occupation, he would have remained liable to be distrained for the whole amount. But the Poor Rate Assessment and Collection Acts, 1869 and 1882, introduced provisions that, in the event of the tenant going out of occupation during the period of the rate, he should only be liable for a proportion. Therefore, the appellant here was, at the date of the summons, only liable for a portion of the rate originally demanded. And the contention has been that he was entitled to a new demand of that portion before a distress warrant would be issued. But the difficulty in the way of that contention is that the overseers have not necessarily the means of ascertaining the precise date at which the tenant goes out of occupation, and cannot, therefore, know the exact sum which they ought to demand, whereas the tenant does know, and therefore has the opportunity of tendering the right amount. It is said that as there was no fresh

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demand of the sum due there was no refusal to pay it. But I think there was; a neglect to pay any part of the larger sum which had been demanded of him was a refusal to pay the sum which was due. I agree with my Lord that the justices having decided the amount which was due were entitled to make their order effective by issuing their warrant at once.

Appeal dismissed.

Solicitors for the appellant: *Speechly, Mumford & Craig, for Lamport, Bassett & Hiscock, Southampton.*

Solicitors for the respondents: *P. J. Nicholls, for Hallett & Martin, Southampton.*

J. F. C.

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Jan. 12, 13.

THE KING *v.* JOHNSTONE AND OTHERS.

Licensing—Provisional Licence—Grant for Seven Years from Final Order—Validity of—Licensing Act, 1874 (37 & 38 *Vict. c.* 49), *s.* 22—*Licensing Act*, 1904 (4 *Edw.* 7, *c.* 23), *s.* 4, *sub-s.* 3.

Sect. 4, sub-s. 3, of the Licensing Act, 1904, which provides that "the justices may, if they think fit, instead of granting a new on-licence as an annual licence, grant the licence for a term not exceeding seven years," applies as well to a provisional licence under s. 22 of the Licensing Act, 1874, in respect of a house about to be built as to an ordinary licence for an existing house. Such a provisional licence is not operative as a licence until the house has been completed and the final order made, and consequently a grant of a provisional licence to be in force for seven years from the date of the final order is a grant of a licence "for a term not exceeding seven years" within the meaning of the above section.

RULE for mandamus to licensing committee of county of Essex to hear an application for confirmation of a provisional licence.

On February 27, 1905, an application was made to the licensing justices of the Tendring division of the county of Essex on behalf of Messrs. Cobbold, brewers, of Ipswich, for a provisional licence for an hotel which they proposed to build at Parkeston, in the said county. The justices having approved the plans of the proposed building, made a provisional grant to

Mr. J. D. Cobbold of a licence to be in force "for seven years from the date of the declaration by the justices under the Licensing Act, 1874, s. 22, that the proposed house has been completed in accordance with the deposited plans"; the said licence being granted on the following conditions: (1.) That the licensee should pay the monopoly value as provided by s. 4 of the Licensing Act, 1904, which monopoly value they assessed at 180*l.* per annum; and (2.) that the licensee should acquire a frontage of 120 feet at least on the main road. In accordance with the conditions the licensee acquired the prescribed frontage. Subsequently on April 17 application was made on his behalf to the licensing committee of the county for a confirmation of the licence. This application was opposed on behalf of Messrs. Charrington, Nichol & Co., the owners, and Mr. Burgess, the tenant, of a certain other hotel in Parkeston, and objection was taken by them that the provisional licence was bad on the face of it, as it covered a period longer than seven years. The justices upheld the objection and refused the application. A rule nisi having been obtained on behalf of Messrs. Cobbold for a mandamus to the licensing committee to hear the application,

Rowsell, for the justices, shewed cause. A provisional licence operates as a licence from the date when it is granted, and is subject to the same conditions, including the right of renewal, as an ordinary licence: *Reg.* v. *Justices of London* (1); though no doubt the right of the grantee to apply under it for the excise licences is suspended until the justices have certified that the house is completed in accordance with the plans. But that restriction does not prevent it from being a licence and a marketable asset from the date of the grant. Therefore the grant of a provisional licence for seven years to commence at a future date must necessarily be a present grant for a period of more than seven years. The object of the provision in the Act of 1904 limiting the period of the grant of a new licence to seven years was to prevent the justices from divesting themselves of the power of reassessing the monopoly value of the licence for a longer period, whereas if they were allowed to

(1) (1889) 24 Q. B. D. 341.

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grant a provisional licence for seven years to commence from the completion of the house, which might take three years to build, they would deprive themselves of the power of reassessing the value for ten years.

Bruce Williamson, for Messrs. Charrington, Nichol & Co. By virtue of s. 13 of the Alehouse Act, 1828 (9 Geo. 4, c. 61), as amended by the Licensing Act, 1902 (2 Edw. 7, c. 28), s. 33 and Sched., all licences are to commence and expire on April 5. There is no power to grant them from any other date. Even when a licence is confirmed it runs from the preceding April 5. The Act of 1904 provides that the justices may grant a new licence for seven years instead of for one year as theretofore, but it was not thereby intended to alter the date at which the licence was to begin; the seven years' licence equally with the annual licence was to expire on an April 5. That section was not meant to apply to a provisional licence at all, for if it were to be held so to apply it would create an anomalous exception to that uniformity in the currency of licences throughout the country which it was one of the objects of the Act of 1902 to secure. If the seven years is to run from the completion of the house, which may be on any day in the year, there may on the expiring of the seven years be a hiatus of several months before the next April 5, during which either the premises will have to remain unlicensed, or the licence will have to be regranted from an irregular date.

Pickford, K.C., and *Poyser*, in support of the rule. The Act of 1904, s. 4, sub-s. 3, applies as well to provisional licences as to ordinary new licences. But a provisional licence does not become operative as a licence until the house is finished and the time has arrived for the seven years to begin. There is no difficulty arising from the fact that the date of a provisional licence granted for a term might not synchronize with that of ordinary licences, for the grantee would apply at the general annual licensing meeting next before the expiry of his term for a licence to commence at the date of that expiry and to continue in force until the succeeding April 5. The fact that the operation of such a licence would be suspended until the existing licence expired would be no objection, for that is what happens in every case of

an application for renewal. The application is made during the currency of the existing licence for a renewal to take effect on the next April 5. There is nothing in the point that the justices would lose the control of the monopoly value for more than seven years, for a provisional licence has no monopoly value till it comes into force.

LORD ALVERSTONE C.J. In my opinion the confirming authority were wrong in refusing to entertain the application for the confirmation of the licence which was provisionally granted under s. 22 of the Licensing Act, 1874. Mr. Rowsell's contention on behalf of the justices was that the grant of a provisional licence for a period of seven years to commence at a future date, namely, at the date of the final order, is bad, as contravening the provisions of s. 4, sub-s. 3, of the Licensing Act, 1904, which enacts that the justices may "instead of granting a new on-licence as an annual licence, grant the licence for a term not exceeding seven years." It was argued that the case of *Reg.* v. *Justices of London* (1) decided that a provisional licence was just as much a licence as was an ordinary licence, and as such was consequently capable of renewal. If it were true that that decision went that length, and decided that a provisional licence was in all respects an effective licence from the date on which the grant of it was made, then Mr. Rowsell's contention might be right. But in my opinion that is not the position of a provisional licence. Sect. 22 expressly says that "a provisional grant and order of confirmation shall not be of any validity until it has been declared to be final by an order of the licensing justices," which declaration is not to be made until the justices are satisfied that the house has been completed in accordance with the plans submitted to them. It may be that for some purposes a provisional licence is equivalent to, and is subject to the incidents of, an ordinary licence, but it does not follow that the grant of a provisional licence cannot be made for a period of seven years commencing from the date of the final order. But further it was contended by Mr. Bruce Williamson, on behalf of the parties opposing the confirmation, that s. 4, sub-s. 3, of the Act of 1904

(1) 24 Q. B. D. 341.

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has no application to provisional licences at all. Prima facie I can see no good reason why it should not, indeed if it is desirable in any case that a new licence should be granted for a period of seven years in respect of a house that is already built, a fortiori would it appear desirable in the case of a provisional licence, so that a person who is about to embark his money in the building of an hotel should know beforehand that when the house is built he will get a licence at all events for a certain term, and he will consequently not have spent his money wholly in vain. But it was said that so to hold would create a difficulty in that it would contravene s. 33 of the Licensing Act, 1902, which provides, by an amendment of s. 13 of the Alehouse Act, 1828, that all licences throughout the country shall begin and expire on April 5. It may be that that is a difficulty which was not foreseen by the Legislature, and was not therefore provided for, but it is not, in my opinion, one which ought to influence our decision if the construction of the section is in other respects reasonably clear. Nor am I at all clear that the difficulty really arises. It may possibly be met, as Mr. Pickford suggested, by an application to the licensing justices at the February meeting before the seven years have run out for a new licence in anticipation of the expiry of the existing licence to commence at the date of the expiry. For these reasons I come to the conclusion that it was not ultra vires the justices to grant this provisional licence for seven years from the date of the final order, and the licensing committee ought to have heard the application for confirmation of the licence. The rule must be made absolute.

RIDLEY and DARLING JJ. concurred.

Solicitors for the prosecutor: *Godden, Sons & Holme, for Ward & Hugh-Jones, Harwich.*

Solicitors for the justices: *Patersons, Snow, Bloxam, & Kinder, for H. W. Gibson, Chelmsford.*

Solicitors for the opposing parties: *Beaumont & Bright, Maldon.*

J. F. C.

STAINLAND AND HOLYWELL GREEN INDUSTRIAL CORN AND PROVISION SOCIETY *v.* STAINLAND WITH OLD LINDLEY URBAN DISTRICT COUNCIL.

1906
Jan. 13.

Local Government — Cleansing of Privies and Cesspools — Power of Local Authority to undertake Duty of—Public Health Act, 1875 (38 & 39 *Vict. c.* 55), *s.* 42.

A local authority may, under s. 42 of the Public Health Act, 1875, undertake the cleansing of earth-closets, privies and ashpits in their district without at the same time undertaking the cleansing of cesspools.

Case stated by justices of the West Riding.

On April 29, 1905, an information was laid by the respondents, the Stainland with Old Lindley Urban District Council, against the appellants, for having neglected to cleanse a cesspool belonging to premises in their occupation, contrary to a by-law of the said council made on June 23, 1890.

At the hearing it was proved that the appellants were the occupiers of certain premises situate at Stainland, within the district of the council, on which premises there was a cesspool used in connection with it. The premises consist of a shop and slaughter-house and stables. The cesspool received the drainage from the slaughter-house and stables and from the shop also. The premises were erected some time prior to 1890. At the date of the information the cesspool required cleansing, and notice had been given by the respondents to the appellants requiring them to cleanse it, which the appellants refused to do, alleging that it was the duty of the respondents themselves to empty and cleanse the same. On June 23, 1890, by-laws were made under s. 44 of the Public Health Act, 1875, by the local board for the district of Stainland with Old Lindley (the predecessors of the respondents), with respect to the cleansing of earth-closets, privies, ashpits, and cesspools. At the time the said by-laws were made the local board had not themselves undertaken or contracted for the cleansing of earth-closets, privies, ashpits and cesspools.

On September 6, 1894, the respondents had, pursuant to s. 42 of the Public Health Act, 1875, passed the following

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resolution: "Resolved . . . . that the scavenging of privies, closets and ashpits be undertaken by the board at once." That resolution was duly confirmed by the council on September 10, 1894. From and after the passing of that resolution the respondents had carried out the work of scavenging privies, closets and ashpits within their district, but had not at any time cleansed or emptied cesspools. The appellants had from time to time, at their own expense, both before and after the making of the said by-laws, emptied and cleansed the cesspool in question down to the present time, when the question as to whose duty it was to carry out such cleansing and emptying of cesspools was raised by them.

The respondents had, from the passing of the above resolution in September, 1894, provided in their estimates of expenditure for each year a sum for the scavenging of their district, and a copy of the resolution passed by the respondents on March 30, 1904, approving of the estimate for the general district rate of 3*s.* in the pound was put in evidence, which estimate included an item of "Scavenging, 150*l.*" The appellants, as ratepayers, had duly paid their quota towards the general district rates in accordance with the demand note served upon them.

The appellants contended that the respondents have undertaken to act under s. 42 of the Act, were bound to empty and cleanse cesspools in their district, and that the whole of the by-laws made in June, 1890, were abrogated by the resolution passed in September, 1894. The respondents, on the other hand, contended that it was competent for their predecessors, the local board, to resolve as they had done, to undertake only part of the duty of scavenging and cleansing referred to in paragraph 2 of s. 42 of the Public Health Act, 1875, and that the by-laws in question were still in force.

The justices held that the contention of the respondents was correct, and they convicted the appellants subject to a case.

R. Cunningham Glen, for the appellants. The resolution of the respondent council of September, 1894, purported to be a resolution under s. 42 of the Public Health Act, 1875. By that section, "Every local authority may, and when required by the

order of the Local Government Board shall, themselves undertake or contract for . . . . the cleansing of earth-closets, privies, ashpits and cesspools." The words are "*and* cesspools" not "*or*." They may if they think fit undertake the cleansing of all four of the classes of receptacles of filth there mentioned, but cannot lawfully undertake the cleansing of one or more of those classes to the exclusion of the others. To hold otherwise would be unjust. The expense of such cleansing would be thrown on the general body of the ratepayers, and one man who had a water-closet draining into a cesspool might have to contribute to the cost of cleansing his neighbour's earth-closet or privy without getting a corresponding benefit out of the rates in respect of his own premises. The adoption of the duty by the local authority ought to be equal as regards all the ratepayers. And in s. 43 the word "and" is again repeated. "If a local authority who have themselves undertaken or contracted for . . . . the cleansing of earth-closets, privies, ashpits *and* cesspools fail without reasonable excuse to cleanse any of them they shall be liable to a penalty. Such then being the powers of the local authority under s. 42, the resolution must be treated as an expression of intention to carry out the provisions of that section, in other words, as a resolution to undertake the cleansing of cesspools as well as earth-closets and privies, although cesspools are not therein mentioned.

Daldy, for the respondents. The by-law of 1890 which imposed the duty upon the occupiers of cleansing their cesspools was a perfectly valid by-law under s. 44. And if the resolution of September, 1904, is bad on the face of it as not carrying out the provisions of s. 42, it is ineffectual to repeal the by-law, and the by-law stands. Consequently even if the appellant's contention as to the construction of s. 42 is right, he still ought to have been convicted. But, secondly, the appellant's contention is wrong. The word "and" must be read as meaning "or"; it is used distributively. We have an instance of that use of the word in s. 44, which enacts that an urban authority having made by-laws "for the prevention of nuisances arising from snow, filth, dust, ashes and rubbish." It could never be contended that under those words the authorities were precluded from making a

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by-law dealing with ashes unless they also made one dealing with snow.

Glen, in reply.

LORD ALVERSTONE C.J. I think it better not to decide the case upon Mr. Daldy's first point, but to deal with it on the merits. The substantial question is as to the construction to be put upon s. 42, and whether the word "and" is to be read as distributive. In 1890 a by-law was made, imposing upon the occupier the duty of cleansing earth-closets, privies, ashpits, and cesspools. Then in 1894 a resolution was passed by the local authority, whereby they themselves undertook the cleansing of privies, closets, and ashpits. It is said that the effect of that resolution was to impose upon the local authority the duty of cleansing cesspools as well. I have, however, though not without some doubt, come to the conclusion that we ought not to construe the section as making it imperative on the local authority to undertake the duty of cleansing all four classes of receptacles, in the event of their undertaking that duty in respect of one. No doubt there is much to be said in favour of the view that this may bear unfairly on certain ratepayers. But I think on the whole that the words were intended to be read distributively, and that it was intended to be left to the option of the authority whether they would undertake the duty in respect of some of the four classes or of all. It is to be observed that s. 42 empowers the Local Government Board to order the local authority to undertake the very same duties which it empowers the local authority voluntarily to undertake; and it would be a strong thing to say that the section intended to limit the powers of the Local Government Board as to the order they should make. I am of opinion, therefore, that the passing of the resolution did not have the effect of repealing the by-law as to the cleansing of cesspools, and that the conviction consequently must stand.

RIDLEY J. I agree.

DARLING J. I also agree, though I also have entertained some doubts as to which way the section should be read. But in view

of the grave objections that exist to holding that the discretion of the urban authority is limited in the manner contended for, and to the still graver objections to holding that the discretion of the Local Government Board is similarly limited, I think that the contention of the respondents must prevail and the appeal must be dismissed.

Appeal dismissed.

Solicitors for the appellants: *Helliwell, Harby & Eversheld.*

Solicitors for the respondents: *Robbins, Billing & Co., for Longbotham & Son, Halifax.*

J. F. C.

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Nov. 3, 6, 25.

Shipping—Bill of Lading—Untrue Statement as to Condition of Goods—"Shipped in Good Order and Condition"—Master's Authority—Liability of Shipowner—Estoppel—American "Harter Act"—Measure of Damages.

Shippers of goods at a foreign port chartered a ship to carry the goods to London. The charterparty provided that the master should sign bills of lading in the form indorsed on it. That form contained the clauses "shipped in good order and condition, and to be delivered in the like good order and condition," and "quality and measure unknown," and incorporated the American "Harter Act," which imposes upon shipowners and masters the duty of delivering to shippers of merchandize bills of lading stating (inter alia) "the apparent order and condition" of the merchandize delivered for carriage. The goods in question were damaged before shipment, and the damage was apparent. The master, however, took them on board and gave the shippers a bill of lading in the form indorsed on the charter. Before delivery of the goods in London the shippers sold them to purchasers there, who thereupon became indorsees of the bill of lading to whom the property in the goods passed. On presentation of the bill of lading and shipping documents the purchasers paid the contract price of the goods to the shippers, and the goods having been delivered in their damaged condition in London, the purchasers, in an arbitration between themselves and the shippers, obtained an award against the latter for damages representing the difference between the price paid by the purchasers and the value of the goods when delivered. The purchasers did not sue the shippers, who were a foreign firm, on that award, but now sued the owners of the ship for damages for not delivering the goods in good order and condition:—

Held, that the words in the bill of lading "shipped in good order and

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condition" were not words of contract, and the purchasers were not entitled to sue for any breach of contract in respect of them; but that the shipowners were bound by the representation of the master in the bill of lading that the goods were shipped in good order and condition; and that, there being sufficient evidence that the purchasers had altered their position and acted to their own prejudice on the faith of that representation, the shipowners were estopped from denying the truth of it, and were liable in damages to the purchasers for not delivering the goods in good order and condition, the measure of damages being the difference between the price paid by the purchasers and the value of the goods when delivered, together with the reasonable expenses incurred on delivery by reason of their damaged condition.

COMMERCIAL CAUSES, tried by Channell J.

The actions, which were consolidated, were brought by the plaintiffs, who were the owners of the steamship *Virgen de Lourdes*, to recover freight on three parcels of timber carried under three bills of lading, the defendants Churchill & Sim being the indorsees of two of those bills of lading, and the defendants John Burton & Co. of the third. The claims for freight were admitted subject to counter-claims, and the defendants counter-claimed damages against the plaintiffs for not delivering the timber to the defendants in good order and condition according to the terms of the bills of lading.

The facts were substantially the same in both actions.

By a charterparty dated November 9, 1904, and made between the plaintiffs and shippers, named Reeves-Powell Company, Limited, at New Orleans, the ship was chartered to proceed to Port Arthur, in Texas, and there take on board a cargo of sawn pitch-pine timber to be carried to London.

The charterparty provided that bills of lading should be prepared by the shippers in the form indorsed on the charter, and should be signed by the master, "quality and measure unknown," freight and all conditions, clauses and exceptions as per the charter; that the charterparty should be subject to all the terms and provisions of, and exemptions from liability contained in, the Act of Congress of the United States relating to navigation, &c., approved on February 13, 1893 (known as the Harter Act) (1); that the master should sign for the number of pieces

(1) The Harter Act, s. 4, provides: "It shall be the duty of the owner or owners, masters, or agent of any vessel transporting merchandize or

shipped, and the shipowners should be responsible for the number of pieces so signed for by the master or his duly authorized agent, fraud, clerical, or other obvious errors excepted, and that the shipper's responsibility under the charterparty should cease as soon as the cargo should be shipped and bills of lading signed, provided that all the conditions called for in the charterparty should have been fulfilled or provided for by bills of lading.

The timber to be carried under the charterparty became badly stained and saturated with petroleum whilst awaiting shipment, and at shipper's risk, at Port Arthur. The damage was of such a character as that it must have been apparent to anyone, and was, in fact, noticed at the time of shipment. The selling value of the timber was seriously depreciated. The marks and brands upon it were obliterated. The captain, however, received the timber on board, and signed three bills of lading for it in the form indorsed on the charterparty. Each of those bills of lading, when the blank spaces left in the form had been filled up, contained the following material clauses and conditions:—"Shipped in good order and condition by Reeves-Powell Company, Limited, in and upon the good Spanish steamship called the *Virgen de Lourdes*, whereof B. Sagabarrai is master for this present voyage, now lying in Port Arthur and bound for London, England, 753 pieces sawn pitch-pine timber branded R. P. marked X with red paint, And to be delivered in the like good order and condition at the aforesaid port of London, England . . . . unto orders of shippers or their assigns, he or they paying freight for the same as per charterparty dated November 9, 1904, all the terms and exceptions contained in which charter are herewith incorporated and form part hereof. . . . . This bill of lading is subject to all the terms and provisions of and to the exemptions

property from or between ports in the United States and foreign ports to issue to the shippers of any lawful merchandize a bill of lading, or shipping document, stating, among other things, the marks necessary for identification, number of packages or quantity, stating whether it be carriers' or shippers' weight and apparent order and condition of such merchandize or property delivered to and received by the owner, master, or agent of the vessel for transportation, and such document shall be prima facie evidence of the receipt of the merchandize therein described."

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from liability in" (the Harter Act). At the foot of the bill of lading were the words "quality and measure unknown."

By contracts in writing dated November, 26, 1904, the shippers agreed to sell and the defendants agreed to buy the shipment of timber, the amount of the invoices to be paid in cash on presentation of invoices, bills of lading and policies of insurance, any dispute arising under the contracts to be settled by arbitration. On presentation of the bills of lading, invoices, and policies the defendants paid the contract prices of the timber to the shippers and became indorsees of the bills of lading to whom the property in the timber passed.

On the arrival of the ship at the Surrey Commercial Docks the consignments of timber were delivered overboard, not as separate parcels, but mixed up together, and in consequence of the marks having been obliterated the dock company's servants found it impossible to separate the parcels. After considerable delay it was agreed between the consignees that some one should apportion the cargo between them. This was done, and expenses were incurred in respect of the separation of the parcels, and warehouse rent. The defendants made a claim against the shippers for damages sustained by the defendants owing to the damaged condition of the timber on its arrival at the Surrey Commercial Docks. This claim was submitted to arbitration under the arbitration clause in the contracts of sale, and the arbitrator awarded to the defendants a sum of 572*l.* 12*s.* as damages, being the difference between the contract price of the timber and its depreciated value through being stained by petroleum. The defendants had taken no steps to enforce the award against the shippers, who were a foreign firm.

By their counter-claims in the present action the defendants claimed damages for the breach of a warranty, contained in the bills of lading, that the timber was shipped in good order and condition, and they alleged alternatively that the plaintiffs under the circumstances were estopped from alleging that the goods were not in fact so shipped. They claimed as damages an amount equal to that awarded by the arbitrator in the arbitration between themselves and the shippers, and the expenses incurred owing to the marks on the timber having become obliterated.

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J. A. Hamilton, K.C., and *A. H. Chaytor*, for the detendants. First, the defendants have a cause of action against the plaintiffs for breach of the contract in the bill of lading. That contract is that goods which it is agreed are "shipped in good order and condition" shall be "delivered in the like good order and condition." The words "shipped in good order and condition" are words of agreement or warranty as to the condition of the goods when shipped. By the terms of the charterparty, which is incorporated with the bill of lading, the shipper's liability ceases as soon as the goods are on board and the bill of lading signed. By the Bills of Lading Act, 1855 (18 & 19 Vict. c. 111), s. 1, the benefit of the contract is transferred to the indorsee of the bill of lading to whom the property has passed. The defendants, therefore, are entitled to sue the shipowners for damages for breach of the contract to deliver the timber in good order and condition. The words "quality and measure unknown" do not qualify the words "shipped in good order and condition"; they do not relate to order and condition at all. Secondly, if the words "shipped in good order and condition" are not words of contract, the plaintiffs are estopped from denying that the timber was in fact so shipped: *Sears* v. *Wingate* (1); *Craig* v. *Delargy*. (2) Those words are a representation of fact by the master of the ship as to the condition of the goods at the time of shipment. That representation was untrue and made negligently, but it was a representation which it was within the scope of his employment to make, and therefore binding upon the shipowners. The cases shew that a master has authority to insert in the bill of lading a clause with respect to the condition of the goods shipped: see the judgment of the Court delivered by Jervis C.J. in *Grant* v. *Norway* (3), and the judgment of Lord Esher M.R. in *Cox* v. *Bruce*. (4) Further, the Harter Act is incorporated in the bill of lading, and by s. 4 a duty is imposed upon owners and masters to state (which must mean state truly) in the bill of lading the apparent order and condition of the goods. The defendants here, being indorsees of

(1) (1861) 85 Mass. 103.

(2) (1879) 6 R. 1269; judgment of Lord Shand, at p. 1281.

(3) (1851) 10 C. B. 665, at p. 687.

(4) (1886) 18 Q. B. D. 147, at p. 152.

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the bill of lading, have paid away the price of the goods to the shippers, relying on the representation in the bill of lading as to the condition of the goods when shipped, and have thereby acted to their own prejudice. The shipowners are therefore estopped from denying the truth of the representation, and are liable to the defendants in damages for not delivering the goods in good order and condition. One of the purposes of giving bills of lading is that they may be delivered to purchasers as representing the goods. That fact distinguishes this case from *Le Lievre* v. *Gould* (1) and similar cases. It is immaterial that the defendants may have some claim which they could possibly enforce against the shippers; they are entitled to enforce their right against the shipowners under the bill of lading and by reason of the estoppel. The damages recoverable are the difference between the contract price of the goods and their value when delivered, together with the expenses of dividing and warehousing them.

[They also referred to *Howard* v. *Tucker* (2) and *Leduc* v. *Ward*. (3)]

Scrutton, K.C., and *J. Dawson Millar*, for the plaintiffs. The words "shipped in good order and condition" must be read with the words at the foot of the bill of lading, "quality and measure unknown." The latter clause neutralizes the former, and in the result there is no contract or warranty that the goods are shipped in good order and condition; there is the mere statement by the master that he has taken the goods on board in the condition in which they were brought to him for shipment: *The Ida* (4); *Craig* v. *Delargy*. (5) If the master has made an incorrect statement as to the condition of the goods, it was made without authority, and the shipowners are not bound by it. It is not within the master's authority to make statements in the bill of lading as to measure and quality and condition and the like: *Grant* v. *Norway* (6); *Cox* v. *Bruce*. (7) Here he was bound by the charterparty to sign bills of lading in the form indorsed on

(1) [1893] 1 Q. B. 491.
(2) (1831) 1 B. & Ad. 712.
(3) (1888) 20 Q. B. D. 475.
(4) (1875) 32 L. T. 541.
(5) 6 R. 1269.
(6) 10 C. B. 665.
(7) 18 Q. B. D. 147.

the back; the bills of lading incorporated the charterparty, and the defendants knew that he was only following the form and not making any representation on his own account. The Bills of Lading Act, 1855, only transfers to the indorsees of a bill of lading the contractual obligations which existed between the shipper and the shipowner, and here the shippers could not have sued upon the representation made by the master, because they knew the condition of the goods when shipped as well as he did. The indorsees can have no better right to sue the shipowners than the shippers had. There is no estoppel, because the master has no duty towards the indorsees; his duty is towards his principals, the shipowners, and they are not bound by an untrue representation made by him, even though they may know that purchasers of the cargo will see the representation and may part with their money on the faith of it: *Grant* v. *Norway* (1); *Cox* v. *Bruce* (2); *Craig* v. *Delargy* (3); *Thiodon* v. *Tindall* (4); *Le Lievre* v. *Gould.* (5) The argument for the defendants in the present case would have applied equally in the two cases last cited. Sect. 4 of the Harter Act makes the bill of lading prima facie evidence of the receipt of the merchandize therein described. The document is purposely made prima facie evidence only; the statement that the goods are shipped in good order and condition may be contradicted by the shipowner. The defendants have suffered no damage. They have obtained an award against the shippers for damages representing the difference between the contract price of the goods and their value when delivered. They have not sued on the award or shewn that the shippers are insolvent. The damages are too remote. The principle of cases like *Collen* v. *Wright* (6) with respect to remoteness of damage is applicable.

[They also referred to *Spence* v. *Union Marine Insurance Co.* (7)]

J. A. Hamilton, K.C., replied.

Cur. adv. vult.

(1) 10 C. B. 665.
(2) 18 Q. B. D. 147.
(3) 6 R. 1269.
(4) (1891) 7 Asp. (N.S.) 76; 60 L. J. (Q.B.) 526.
(5) [1893] 1 Q. B. 491.
(6) (1857) 7 E. & B. 301; 8 E. & B. 647.
(7) (1868) L. R. 3 C. P. 427.

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Nov. 25. The following judgment was read by

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CHANNELL J.:—These actions were brought to recover the freight on three parcels of timber carried under three bills of lading, the defendants Churchill & Sim being the indorsees of two bills of lading and the defendants John Burton & Co. of the third. The facts as to all three parcels were the same. The actions were consolidated, and, the freight being admitted subject to counter-claims, the only questions in dispute arose on the counter-claims. The bills of lading stated in the common form that the timber was "shipped in good order and condition." It is alleged that it had been damaged prior to the shipment, and the question principally argued was as to what remedy, if any, the indorsee of the bill of lading had against the shipowner under such circumstances. It is surprising to find that a question so likely to arise has not been settled long ago, but it seems not to have been, and I, therefore, took time to consider the authorities. There are other questions in the case which it will be convenient to deal with first, as if they are decided in favour of the plaintiffs the main question does not arise. The timber on its arrival was found to be badly stained and saturated with petroleum, and there is no doubt that it became so stained whilst it was being brought alongside for shipment, or when alongside ready for shipment but before it was taken on board. The plaintiffs contended that, notwithstanding the staining, the timber could properly be described as shipped in good order and condition, because, they said, the petroleum would not necessarily damage it, and for some purposes, such as that of its being used for piles, it was as good as if not so stained and saturated. It was, however, clear on the evidence that the selling value of the timber was seriously depreciated, and it had not been intended to use it for piles. In my opinion, not only was there damage in fact, but it was damage of such a character that it must have been apparent to anyone. It was, in fact, noticed at the time of shipment. The mate made note of it in his log, and says that he drew the captain's attention to it. The captain, whose evidence was taken some time after the mate had given his account and after it was admitted by everyone that the damage could not have been done on board, denies the mate's statement and

endeavours to make out that he formed the opinion at the time that there was no damage. In the face of the other evidence I cannot accept the captain's account. In my opinion it was a misstatement to say that the timber was shipped in good order and condition, and, if necessary, I should be prepared to find that it was a negligent misstatement. It is next said that this statement was qualified or neutralized by the words coming lower down, "quality and measure unknown." For this Mr. Scrutton quoted *The Ida* (1) and *Craig* v. *Delargy* (2), where somewhat similar words were held to qualify what would otherwise have been an admission. It seems to me that while in reference to some things and to some defects in them "condition" and "quality" may mean the same thing, yet that they do not either necessarily or even usually do so. I think that "condition" refers to external and apparent condition, and "quality" to something which is usually not apparent, at all events to an unskilled person. I think a captain is expected to notice the apparent condition of the goods, though not the quality. He may qualify or (except perhaps when the Harter Act applies) erase the words "good order and condition"; but if he leaves them in he does not, in my opinion, get rid of the admission as to condition (meaning thereby apparent condition) by saying that the quality is unknown. It is probably unnecessary for him to protect himself as regards quality, which it is not his business to know anything about, except perhaps when the description of the goods set out in the bill of lading contains words importing a statement as to the quality. Next it was said that in this case the charterparty obliged the captain to sign bills of lading in the form indorsed, and that this form contained the words "good order and condition," and that, the terms of the charterparty being incorporated in the bill of lading, the indorsee of the bill of lading ought to have known that the captain was only signing that which he was bound by the charterparty to sign. I do not, however, think that the captain was bound by the charterparty to sign an untrue statement in the bill of lading. He was, in my opinion, at liberty to qualify the words according to the truth, without departing from the form. Moreover, the Harter

(1) 32 L. T. 541. (2) 6 R. 1269.

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Act was also incorporated, and by that he is bound to state in the bill of lading the "apparent order and condition." The next question is whether the captain in making that statement as to good order and condition was acting within the scope of his authority so as to bind his owners, or whether his making an untrue statement on this point can be said to be outside his authority, as the signing of a bill of lading for things not on board has been held to be. On this I think that, even when the Harter Act does not apply, the statement is within his authority, and, whatever its effect may be, it binds the owner and not merely the master personally. In *Cox* v. *Bruce* (1), one of the cases in which *Grant* v. *Norway* (2) was acted on, Lord Esher M.R. says that that case itself shews that the captain had had "authority to bind his owners with regard to the weight, condition, and value of the goods under certain circumstances," and he appears to draw the same distinction which I have drawn between quality and condition. Further, when the Harter Act applies, as it seems to do here from the manner in which the bill of lading is made subject to its terms and provisions, the liability of the owner appears to be concluded by the 4th section. As my view on all these preliminary points is in favour of the defendants, it does become necessary to consider what remedy the defendants have against the shipowner arising from the misstatement as to the apparent condition of the goods at the time of shipment. The defendants put their case alternatively either as a claim on the contract contained in the bill of lading, or by way of estoppel. First, as to the suggested breach of contract—No doubt by the Bills of Lading Act the indorsee to whom the property has passed becomes a party to the contract made originally between the shipper and shipowner and evidenced by the bill of lading. But, as has been pointed out in more than one case, the contract must be construed in the same way between the original parties and the substituted parties, and it is necessary to see exactly what the original contract is. It seems to me that the contract is to deliver the goods in the same condition as that in which they are shipped, coupled with an acknowledgment that the condition at the time of shipment

(1) 18 Q. B. D. 147, at p. 152. (2) 10 C. B. 665.

was good. The words "shipped in good order and condition" are not words of contract in the sense of a promise or undertaking. The words are an affirmation of fact, or perhaps rather in the nature of an assent by the captain to an affirmation of fact which the shipper may be supposed to make as to his own goods. So far, therefore, as the words of the bill of lading, apart from the incorporation of the Harter Act, are concerned, I see no contract that the condition of the goods is correctly described. The 4th section of the Harter Act makes it the duty of the captain to insert in the bill of lading a statement as to the condition of the goods, and I agree that this means that he is to make a true statement; but I have a difficulty in seeing that the clause that the bill of lading is to be "subject to all the terms and provisions and to the exemptions from liability contained in" the Harter Act imports a contract that the statement as to the condition of the goods is true. I think, therefore, though not without some doubt so far as the effect of the incorporation of the Harter Act is concerned, that the cause of action must be based on estoppel, and not on breach of contract. It seems to me, however, that the case does come within the recognized rules as to estoppel. The statement, as I have pointed out, is one of fact. If not exactly intended to be acted on, it must be known that it would probably be acted on. Bills of lading are transferable, and the object of the shipper in asking for the insertion of the statement that the goods are in good condition at the time of shipment is clearly rather to have evidence to offer to his transferee than for his own direct benefit. The advantage of what is known as a clean bill of lading is obvious, and I think it would be idle for a master of a ship to say that he did not contemplate a purchaser of the goods acting on the statement that the goods were shipped in good condition. In England there appears no direct authority, but I think there are passages in several judgments in accordance with my view and none to the contrary. In America this question has been considered. In *Sears* v. *Wingate* (1) there is what seems a well-reasoned judgment as to the estoppel between the indorsee of a bill of lading on the one hand and the master and the shipowner

(1) 85 Mass. 103.

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on the other, and the rule is laid down that there is such an estoppel between the indorsee and the master as to statements in the bill of lading so far as they relate to matters which are, or ought to be, in the master's knowledge, and that the owners are estopped in the same way by such statements if they are within the scope of the master's authority. Passages to the above effect from that judgment are quoted with approval in Parsons on Shipping and in the Scotch case, *Craig* v. *Delargy*. (1) Lord Shand quotes the passage from Parsons, and says: "That passage from a writer of eminence on this subject undoubtedly gives countenance to the argument of the pursuers in this matter (that is, the argument that there was an estoppel), but I find that, with the exception of a case which is referred to in support of the concluding words of the passage, all the authorities referred to are American." He goes on to say: "I do not think it is necessary here to decide the general question as to the effect of a representation in the bill of lading, though if it did arise, I must say that the American law seems to me to be rested on reasonable grounds." There is, therefore, the authority of Lord Shand's opinion on the question I am deciding. As the estoppel arises on a direct statement of fact which is incorrect, I do not consider that the question of negligence really arises, but, as I have already said, I should be prepared, if necessary, on the facts of this case to find the statement to be negligent, provided, of course, that there is a duty towards the indorsee to take care. As to this duty, although in my view the incorrect statement cannot be sued on directly as a breach of contract, yet I think the transfer of the contract to the indorsee does create a privity between the indorsee and shipowner, and this gets rid of the doctrine of *Le Lievre* v. *Gould* (2) and the other cases in which it has been held that a duty arising solely out of contract is only a duty towards parties to the contract. It was suggested that the words at the end of the 4th section of the Harter Act prevent any estoppel by saying that the statement is to be prima facie evidence. I think not, because it is not said that it is only to be prima facie evidence, and it is consistent with the words of the section that, upon something

(1) 6 R. 1269, at p. 1281.

(2) [1893] 1 Q. B. 491.

further happening—viz., the acting upon it—it may become conclusive, and also because what is said in the section is that the statement is to be prima facie evidence "of the receipt of the merchandize therein described." The object of these words, or, at all events, one object of them, appears to be to preserve the doctrine of *Grant* v. *Norway* (1), and Mr. Newton Crane, who was called before me as an expert in American law to prove the Harter Act, said that *Grant* v. *Norway* (1) is still recognized as law in America since the Harter Act. In order to make the statement in the bill of lading binding as an estoppel, it is, of course, necessary that it should have been acted on to the prejudice of the person so acting. The defendants here allege that they are prejudiced because, on the faith of the statement that the timber was in good condition when shipped, they accepted the bills of lading as a good tender under a contract for clean timber, and paid their vendors the full contract price; and they further say that, although they have got an award of the umpire on an arbitration under the contract between them and their vendors for 572*l.* 12*s.* as the difference between the value of the damaged timber delivered and that which they ought to have had, yet that this sum has not been paid to them. The vendors have not become insolvent, but they are a foreign firm, and the defendants have not as yet thought fit to sue them on the award. It was suggested on the part of the plaintiffs that the defendants were really making this counter-claim in the interests of the shippers and by arrangement with them; but this is denied, and I cannot hold it to be proved. It is, however, pretty clear that the defendants have not been as active in pressing their claim against the shippers as they probably would have been if they had not got this claim against the shipowner, and they probably have been influenced by the fact that the recovery from the shippers of the amount of the award would embarrass them in recovering, even if it did not, on the correspondence which has taken place, preclude them from recovering, the warehouse rent and the expenses included in their claim in the present action but not included in the award. When money has been paid away to a person who becomes insolvent, as has generally happened in the

(1) 10 C. B. 665.

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reported cases as to estoppel, there is, of course, no difficulty as to the person claiming the estoppel proving that his position has been altered. Where, however, there is no insolvency and there is a legal right to get the money back, the damage by the payment is not so clear. In *Carr* v. *London and North-Western Ry. Co.* (1), a leading case on estoppel, Lord Esher says: "Neither the payment of the warehouse rent nor of the invoice price can be relied upon as damage resulting from the conduct relied upon to support an estoppel to deny the possession of the goods, because either damage can be rectified without the intervention of such an estoppel; there is no consideration for either payment; both were made under a mistake of facts." I am not sure that I understand the exact meaning of the words "without the intervention of such an estoppel," but the passage appears to mean that in the opinion of that learned judge a payment which can be recovered back because it was made under a mistake is not such an alteration of the position of the person making it as would establish an estoppel. If that were so, there would, I think, be few estoppels, practically none except where insolvency had intervened, for where there is a misstatement of a fact such as would possibly create an estoppel the acting on it must always be under a mistake of fact. I think, however, that the learned judge must be considered to have been referring to the facts of the case before him, where apparently there would not have been the slightest difficulty in getting the money back, and that it cannot be truly said as a general proposition that a person cannot be prejudiced by having made a payment which he has a legal right to get back from the person to whom he paid it, unless it is shewn that such person is insolvent. It appears to me that the parting with the money, and consequently the being out of it for a certain period of time, coupled with the trouble and possible expense of establishing the legal right to get it back, may amount to an acting to the payer's prejudice sufficiently to establish an estoppel against the person in reliance upon whose statement he has made the payment. If, however, the pecuniary amount of the prejudice has to be ascertained for the purpose of assessing the damage, there is an obvious difficulty. In the present case I

(1) (1875) L. R. 10 C. P. 307.

am prepared to hold that the defendants did act to their prejudice on the statement so as to create an estoppel; but, if the damage recoverable by the defendants against the plaintiffs is the damage they have sustained by paying the shippers, I should have the greatest difficulty on the evidence before me in assessing the amount. The doctrine of estoppel, however, is that the person estopped is precluded from denying in the same transaction as that in which the estoppel arises the truth of the statement acted on. I think, therefore, I have to say that the plaintiffs, not being able to deny that the goods were in good condition at the time of shipment, must pay the damage which was on delivery found to be done to the goods. This is the part of the case on which I have entertained most doubt. It hardly seems just that the plaintiffs should pay this damage when the defendants have a right to get it, and may even now get it, from the shippers, who are the persons who really ought to pay it, as the goods were at their risk when the damage was done. I do not, however, find any authority for the proposition that, when a person is estopped from denying a statement of fact by reason of another having suffered damage by acting on his statement, the only damage recoverable is the damage so arising; and, on the contrary, I do find that a decision apparently to that effect by Cave J. was reversed in the Court of Appeal in *Henderson & Co.* v. *Williams* (1): see particularly the judgment of A. L. Smith L.J., which appears to overrule the judgment of Denman J. in *Carr* v. *London and North-Western Ry. Co.* (2) Assuming the doctrine of estoppel to apply, I see no logical answer to the defendants' contention that they can recover the damage to the goods, though I think it would be more satisfactory if the damages could in such a case be confined to those actually caused by acting on the erroneous statement. The assessment of the amount at 572*l.* 12*s.* is, of course, not binding as such between the plaintiffs and defendants, but the umpire was called as a witness before me, and I accept his assessment as correct and give the defendants the 572*l.* 12*s.* It may be that the plaintiffs, if they pay this sum, may be able to bring themselves within the doctrine that when two persons are each liable to a third in respect of the

(1) [1895] 1 Q. B. 521. (2) L. R. 10 C. P. 307.

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same matter, and the one on whom, as between the two, the burden ought not to rest, has to pay, he may recover it against the other, see *Moul* v. *Garrett* (1) and cases there quoted. I see, however, considerable difficulty about this, and no such question is before me. I refer to it only as a possible way in which an apparent injustice may be obviated. It remains to deal with the other heads of damage claimed in the counter-claims. The expenses of the award were not paid by the defendants, and therefore, of course, are not recoverable, and it was said they were only claimed by inadvertence. The next claim, 8*l.* 8*s.*, is a small one, but was the subject of considerable argument. The marks on the timber, though stated in the bills of lading (of course, from the information of the shipper), had in fact been obliterated by the petroleum. The captain in his evidence states that in consequence of this the lots of timber to which the separate bills of lading related were distinguished in the ship when loaded by ropes dividing them. They were, however, not delivered as separate parcels, but were delivered overboard in the Surrey Docks, leaving the dock company to separate them as best they could. This, of course, it was impossible to do accurately as the marks had gone. After considerable delay it was agreed between the consignees that some one should apportion the cargo between them, using the specification of length and the dock company's measurement books, but, of course, allotting to one party or the other logs corresponding to the description, without any certainty that they were really his logs. The expense of this was 8*l.* 8*s.*, which is accordingly claimed as damage for not delivering to each consignee the lots of timber in his bill or bills of lading. The answer of the plaintiffs to this claim is that it is always the custom in the Surrey Docks so to deliver, and that the dock company for the consignees, and at their expense, always does the sorting. The sorting which the dock company so does is, however, sorting out according to marks, and the practice assumes that the timber, though delivered mixed, is in a state in which it can be identified. It may be that consignees by adopting the practice prevailing in the Surrey Docks do assent to

(1) (1870) L. R. 5 Ex. 132; (1872) L. R 7 Ex. 101.

their goods being delivered mixed, but they do not in my opinion assent to their being so mixed that they cannot be sorted. It seems to me, therefore, quite clear that the plaintiffs never made the delivery which they ought to the bill of lading holders of the timber in their bills. They had, according to the captain's evidence, at one time the means of doing so, but they themselves mixed the timber knowing that there were no marks by which it could be separated again. I think, therefore, that the 8*l.* 8*s.* is recoverable. The next item is warehouse rent from the time of the arrival of the ship to the date when the timber was ultimately divided by agreement as above mentioned, from March 1 to June 9, over three months. This delay was, in my opinion, quite unnecessary. The defendants account for it by saying that they never had a cargo in such a condition, and really did not know what to do with it. They were during this time getting their claim against the shippers dealt with by the arbitrators. Some delay was, I think, necessarily caused by the state in which the timber was delivered, and by its being mixed, but it might have been viewed, valued, and apportioned much sooner than it was. I think it would be reasonable to allow warehouse rent for one month as damage resulting from the plaintiffs' failure to deliver the separate parcels. A point was made for the plaintiffs that the sums claimed were not really paid for rent, but that an inclusive charge was made by the dock company for various services, which included six months' warehousing free. It appeared, however, I think, that indirectly the warehousing was paid, and that the cost to the consignees must be taken to be increased by the breaches of contract to the extent of one month's warehouse rent. The defendants also claim interest for the sum paid on the money they paid for the timber, on the ground that they were prevented during this time from dealing with the timber by sale or otherwise, and so got no benefit from the money they had paid. I think this is a legitimate claim, but, of course, only for a month, which I have already said was, in my opinion, a sufficient time to have cleared up the difficulties for which I hold the plaintiffs responsible. These figures appear to give Churchill & Sim about 522*l.* on their counter-claim, and Burton & Co. about 150*l.* on theirs.

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But the warehouse rent and the interest for a month must be calculated exactly by the parties. The defendants will, of course have the costs of their counter-claim, and the plaintiffs, I suppose will be entitled to the costs of the action to the time when the freight was formally admitted, which, I suppose, was in the defence.

Judgment for the defendants accordingly on the counter-claim.

Solicitors for the defendants: *William A. Crump & Son.*
Solicitors for the plaintiffs: *Hollams, Sons, Coward & Hawkesley.*

W. A.

C. A.
1905
Dec. 18.

[IN THE COURT OF APPEAL.]

MUTZENBECHER AND OTHERS *v.* LA ASEGURADORA ESPAÑOLA.

Practice—Writ of Summons—Service out of the Jurisdiction—Contract "which ought to be performed within the Jurisdiction"—Breach within the Jurisdiction—Agent for Foreign Principal—Employment in England and elsewhere—Implied Covenant not to prevent Agent acting—Breach in England—Order XI., *r.* 1 (*e*).

By an agreement between the plaintiffs, who were insurance agents in London, and the defendants, a Spanish insurance company, entered into at Teneriffe, where the latter were domiciled, the defendants agreed to employ the plaintiffs as their exclusive representatives for a period of five years in England and elsewhere. At the end of one year the defendants sent their agent-general to England, with authority to revoke the agreement, which he did by notice in writing sent through the London post to the plaintiffs at their place of business. An action for breach of contract was thereupon commenced, and an order for service out of the jurisdiction was obtained. On appeal from the refusal of a judge at chambers to set aside the writ and subsequent proceedings:—

Held, that there was to be implied from the agreement a contract by the defendants not to do anything to prevent the plaintiffs from acting as their representatives in England during the agreed term; that the action was therefore founded on a breach within the jurisdiction of a contract which, according to the terms thereof, ought to be performed within the jurisdiction; and that the order for service out of the jurisdiction was rightly made under Order XI., r. 1 (*e*).

APPEAL from an order of Phillimore J. at chambers, refusing to set aside an order for service out of the jurisdiction, the writ and subsequent proceedings.

The plaintiffs carried on business as insurance agents in London, and the defendants were a Spanish insurance company domiciled in Santa Cruz de Teneriffe, in the Canary Islands. An agreement of agency was entered into in writing between the plaintiffs and the defendants, at Teneriffe, on October 7, 1903. The agreement, which was in Spanish, contained terms to the following effect: (1.) After describing the parties, the defendants being thereinafter called "the company," and the plaintiffs "the agents," the company appointed the agents their exclusive representatives for the United Kingdom of Great Britain and Ireland and her Colonies and Dominions across the seas, for the Continent of Europe (with the exception of Spain, Portugal and Turkey), and for the United States of North America. (2.) The business to be transacted by the agents was reinsurances against fire, maritime insurances and reinsurances, and in North America insurances against fire specifically described. (3.) The company bound itself not to undertake any business which came within the scope of the agreement without the intervention of the agents, and of all contracts offered by the intermediation of any other party or person, a copy was to be given to the agents, in order that they might decide on its acceptance or rejection. (4.) The company were to give a power of attorney to the agents as representatives of the company. The agreement then dealt with the duties of the agents, their remuneration, advices and statements as to business effected by them, and as to losses, and the accounts to be rendered by them. (12.) The accounts current were to be accompanied by a banking account shewing the receipts and payments of the banking account of the company in London, and by vouchers. The agreement provided for the manner of making out the profit and loss accounts, and the company undertook to open at a bank in London, for the use of the business obtained by the agents, a credit of a certain amount, as a guarantee fund, and a current account in the name of the agents to an amount specified, and a provision was made for the increase of the balance of the company's banking account by payments into it, and by the company undertaking not to draw upon it till it reached a certain amount. (18.) There was an arbitration clause providing for the submission of disputes to

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a Court of Arbitration at Berne. (19.) The agreement was stated to be made for a period of five years from the date first mentioned, it was to be void if the amount of the premiums did not reach a specified sum in each year, and in case of the termination of the agreement the company were to continue to pay the stipulated remuneration while the connections obtained by the agents were maintained, or if the business should be transferred to another company.

The plaintiffs carried on the business of agency contemplated by the agreement at their offices in London for about a year. On or about October 24, 1904, they received through the post a notice from the agent-general of the company, written in London under authority given to him by the company, and declaring the agreement to be void from the date of the notice. They also received a notice signed by the agent-general, cancelling the power of attorney that had been given in accordance with the terms of the agreement. They were subsequently served with copies of a deed of revocation by the company of the agreement, ratifying the acts of the agent-general in terminating the agreement and the power of attorney.

The plaintiffs issued a writ for damages for breach of contract of the agreement whereby they were appointed agents of the company for five years, and obtained leave to serve the writ out of the jurisdiction. The defendants entered a conditional appearance, and applied to the judge at chambers for an order to set aside the writ and all subsequent proceedings. The application was refused.

The defendants appealed.

G. F. Emery, for defendants. The contract sued on was not by its terms one that was to be performed within the jurisdiction. To bring a case within Order XI., r. 1 (*e*) the contract, for breach of which the action is brought, must be one which must be performed within the jurisdiction: *Comber* v. *Leyland*. (1) This contract could be performed in a number of places out of the jurisdiction, and was not necessarily to be carried out in England. The defendants were domiciled at Teneriffe, and the contract was

(1) [1898] A. C. 524.

entered into there personally with a member of the plaintiff firm, who signed the contract there. The employment by the principal must be where the contract is actually entered into, and it is there that the obligations on both parties arose to carry out the terms of service on the one side, and of employment on the other. If the contract was not to be performed within the jurisdiction, there could be no breach of it within the jurisdiction, for the breach and the place of performance of the contract must be connected. Even assuming that the contract is one that comes within the rule as one to be, by its terms, performed within the jurisdiction, there has been no breach of it within the jurisdiction. The dismissal of the plaintiffs was an act done by the defendants in Spain when they authorized their agent-general to take the necessary steps to dismiss the plaintiffs. A letter may be evidence of a breach of contract, but does not in itself constitute such a breach: *Cherry* v. *Thompson.* (1) The act of the principals must be looked at, and not the place where a notice of dismissal reached the agent: *Holland* v. *Bennett.* (2) If this were not so, a traveller to a firm, if he received a letter of dismissal, might bring an action in whatever part of the world he might happen to be, on the ground that the contract was broken by his employers at the place where the letter reached him. It could hardly be contended that a breach of contract would occur at the place where a cable message was received, and there is no real distinction between that case and the case of a letter sent by post.

Scrutton, K.C., and *Arthur Pritchard*, for the plaintiffs. It is settled law that Order xi. applies if the covenant of which a breach is suggested, though not expressed in the contract, can be inferred from the contract: *Comber* v. *Leyland* (3); *Duval* v. *Gans.* (4) The covenant to be inferred in this case is to do nothing to interfere with the plaintiffs carrying on the agency for five years in England and elsewhere. In the case of such a negative covenant a breach in one place is not affected by the fact that there may be breaches elsewhere. It is not material that the covenant extends to other places, for there has been

(1) (1872) L. R. 7 Q. B. 573.
(2) [1902] 1 K. B. 867.
(3) [1898] A. C. 524.
(4) [1904] 2 K. B. 685.

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a breach of covenant by the defendants applicable to a contract on their part to be performed within the jurisdiction. The case is not like that of a breach of a single act which might be done at various places, for it is a complaint of a breach of a continuous contract relating to employment in England for five years. *Holland* v. *Bennett* (1) has been relied on as shewing that the breach of contract took place out of the jurisdiction when the defendants resolved to dismiss the plaintiffs, but that was the case of a letter of dismissal written abroad and sent to this country. In the present case the actual dismissal was in England. The defendants sent their agent-general to this country with authority to act for them. He drew up the notice of dismissal and sent it to the plaintiffs in London, and that was a dismissal by the defendants, and an act done by them within the jurisdiction, and is alleged to be a breach of contract on their part. That brings the case so far as the breach of contract is concerned within the order, and it is not necessary to discuss the cases of letters sent from abroad such as *Cherry* v. *Thompson* (2), or the two Irish cases, *Mathews* v. *Alexander* (3) and *Hamilton* v. *Burr*. (4)

G. F. Emery, in reply.

COLLINS M.R. This case undoubtedly raises a question of some nicety. The application which originated the discussion was for leave to serve a writ out of the jurisdiction. The plaintiffs were appointed as representatives of a Spanish firm, to carry on business for them in England upon the terms of a written agreement. They have been summarily dismissed after acting for almost a year by a representative of the Spanish firm, who came to England charged with the duty of considering the position of the plaintiffs, and having full discretion as to the steps that should be taken with regard to them. He exercised that discretion by writing in London a letter of summary dismissal to the plaintiffs. The plaintiffs obtained leave to serve their writ out of the jurisdiction, and the defendants have

(1) [1902] 1 K. B. 867.
(2) L. R. 7 Q. B. 573.
(3) (1873) I. R. 7 C. L. 575.
(4) (1886) 18 L. R. Ir. 297.

applied to have the writ and subsequent proceedings set aside, which has been refused by the judge at chambers.

Order XI. allows service out of the jurisdiction in certain cases, that with which we are concerned being contained in r. 1 (*e*) of the Order, which allows service when "the action is founded on any breach or alleged breach made within the jurisdiction of any contract wherever made, which, according to the terms thereof, ought to be performed within the jurisdiction." Undoubtedly so far as the plaintiffs are concerned the contract ought to be performed within the jurisdiction, but the question is whether it ought equally to be performed by the principals within the jurisdiction. The first clause of the agreement defines the area of the plaintiffs' employment, which includes many places besides Great Britain and Ireland. But the United Kingdom was apparently, as appears by other parts of the agreement, the principal place where the work was to be carried on by the plaintiffs. The second clause of the agreement specifies the business to be carried on, which consisted of reinsurance against fire, maritime insurances and reinsurances and business of the like kind. The company bound itself not to undertake any business such as that entrusted to the plaintiffs without their intervention, and to refer to the plaintiffs all contracts offered through the intermediation of other persons. There are a number of clauses relating to the duties and remuneration of the plaintiffs, as to putting them in credit at a London bank, as to the payment of premiums into the account at that bank, the keeping of the accounts and the sending of surplus moneys to the defendants.

The points taken in support of the defendants' application are that the contract between the parties was not one that, in its terms, had to be performed within the jurisdiction, and that there was not, within the jurisdiction, a breach of any part of the contract that had to be so performed. In my view there can be no doubt that there was a breach of the contract within the jurisdiction, because the case is not that of sending a letter from abroad as in *Cherry* v. *Thompson* (1), but of an act done here in sending to the plaintiffs a letter of dismissal. That act was done by the agent-general of the defendants with their authority

(1) L. R. 7 Q. B. 573.

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and on their behalf, and was thus an act done by them within the jurisdiction.

There arises, however, another point, which is whether the contract was one that by its terms ought to be performed here. It is clear that so far as the plaintiffs are concerned it falls within that description, although no doubt it is capable of being partly performed elsewhere, for the principal part of the duties of the plaintiffs under the agreement are clearly to be done in England. It is said that is insufficient to bring the case within the rule, and that it must be shewn that the contract on the part of the person who is sued must be one to be performed within the jurisdiction. Applying that test to this case, is this a contract that so far as the defendants are concerned can be described as one that ought to be performed in England? I have come to the conclusion that it can be so described. If anyone, undisturbed by consideration of the rule and the decisions, were asked where the contract was to be performed by the defendants, he would certainly decide that the contract pointed to employment of the plaintiffs in this kingdom where the principal work of the agency was to be carried on. Such a conclusion would be a common sense one and would be consonant with the law. There is a double obligation on the defendants, and there might be a breach of duty on their part if they did acts from which they were bound to abstain, or made default in regard to acts which they were bound to do. In either case the obligation exists, though in the one it is to be performed by abstention and in the other by execution. It appears to me that the case has been brought within the rule, as the plaintiffs have shewn a breach within the jurisdiction of a contract, which I think imports an obligation on the defendants to abstain from interfering within the jurisdiction with the carrying on by the plaintiffs of their agency. I think, therefore, that the learned judge was right in refusing to set aside the writ, and that the appeal must be dismissed.

SIR GORELL BARNES, PRESIDENT. This appeal arises on an application to set aside a writ and service out of the jurisdiction, which was refused at chambers. It will be sufficient for me to

say that the agreement by the defendants was to employ the plaintiffs as their exclusive representatives in England for five years. Such an agreement must involve at least this—an undertaking on their part that they will do nothing in England to prevent the plaintiffs from fulfilling their contract, and will do all things necessary in England to enable the plaintiffs to perform their part of the contract. If that is so, the defendants have not done that which they agreed to do, because notice was given, by their authority, declaring the agreement of agency to be void from the date of the notice. That notice appears to have been addressed from the office of the defendants' solicitors in London, and to have been enclosed in a letter from them to the plaintiffs. Therefore the defendants have not done that which they agreed to do, for, in England, they have put an end to the agreement. These circumstances distinguish the case from the decisions cited on behalf of the defendants, and fulfil the two conditions of Order xi., r. 1 (e), under which service of a writ out of the jurisdiction is permitted. The order of the learned judge was therefore right and should be supported.

Appeal dismissed.

Solicitors for the plaintiffs: *Pritchard & Sons.*

Solicitors for the defendants: *Stanley Kent, Henderson & Welch.*

A. M.

1905
Dec. 14.

SMITH *v.* PERRY.

Criminal Law—Conviction—Duplicity—Highway Act, 1835 (5 & 6 *Will.* 4, c. 50), *s.* 72.

Sect. 72 of the Highway Act, 1835, makes it an offence to lay any substance upon the highway "to the injury, interruption or personal danger of any person travelling thereon":—

Held, that a conviction for having laid matter on the highway "to the interruption and personal danger of any person travelling thereon" was not bad for duplicity under The Summary Jurisdiction Act, 1848, for that the act of laying the matter on the highway, followed by any one or more of the consequences above mentioned, constituted but one offence.

CASE stated by quarter sessions for the county of Somerset.

On July 1, 1904, the appellant, who is the surveyor to the urban district council of Minehead, in the county of Somerset, was summoned on an information charging that he, on May 7, in the parish of Minehead, "unlawfully did lay a quantity of rubble upon a certain highway there situate to the interruption *or* personal danger of any person travelling thereon," contrary to s. 72 of the Highway Act, 1835. The appellant was convicted on the said information, and the record as drawn up by the clerk to the justices followed the terms of the information. The appellant appealed to the quarter sessions upon the grounds (inter alia) that the conviction was bad for duplicity and for uncertainty.

On September 17 copy notice of appeal and copy conviction were lodged with the clerk of the peace for the county by the appellant, and on October 7 the conviction was filed with the said clerk of the peace.

On October 15 an amended record of the conviction was drawn up and signed by the convicting justices and filed with the clerk of the peace on October 17. The amended record stated that the appellant was convicted for that he "unlawfully did lay a quantity of rubble upon a certain highway there situate to the interruption *and* personal danger of any person travelling thereon."

On the appeal coming on for hearing, counsel for the appellant took the preliminary objection that the conviction was bad on the

face of it as disclosing two offences stated alternatively. The quarter sessions held that the first record of the conviction had been drawn up in error, and did not correctly represent the decision of the justices, who had power to file a correct record of the conviction; they were further of opinion that in any event the quarter sessions had power, under Baines' Act, to amend the first record, and they treated it as so amended. Thereupon counsel for the appellant contended that the conviction as amended was equally bad on the face of it, on the ground that it disclosed two offences stated cumulatively, and he relied on the decisions in *Cotterill* v. *Lempriere* (1), *Rex* v. *Slater* (2), and *Rex* v. *Wells.* (3)

The quarter sessions held that the words "to the interruption or personal danger of any person travelling thereon" in s. 72 of the Highway Act did not create two offences, but one; and they accordingly rejected the appellant's contention, and held that the conviction was good in law.

S. G. Lushington (*F. E. Weatherly* with him), for the appellant. It is an essential part of the offence of causing a nuisance by laying substances on the highway under s. 72 of the Highway Act of 1835 that the act should be done to the injury of the highway or to the injury or interruption or personal danger of persons travelling thereon: *Stinson* v. *Browning* (4); *Hill* v. *Somerset.* (5) Then, if the above-mentioned consequences are respectively parts of the offence, the act will be a different offence according as it is followed by one of those consequences or by another. But by s. 10 of 11 & 12 Vict. c. 43: "Every such information shall be for one offence only, and not for two or more offences." Therefore, even if the justices had jurisdiction to amend the record, the conviction was bad as amended, for it convicted the defendant of two different offences.

In *Rex* v. *Wells* (3) a conviction for driving a motor car on a public highway "at a speed or in a manner which was dangerous

(1) (1890) 24 Q. B. D. 634.
(2) (1903) 67 J. P. 299.
(3) (1904) 68 J. P. 392.
(4) (1866) L. R. 1 C. P. 321.
(5) (1887) 51 J. P. 742.

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to the public"—following the words of s. 1 of the Motor Car Act, 1903 (3 Edw. 7, c. 36),—was held bad for duplicity, for that under the Act the driving at an improper speed and driving in a dangerous manner constituted two different offences. In *Cotterill* v. *Lempriere* (1), where a by-law provided that "no smoke or steam shall be emitted from the engines so as to constitute any reasonable ground of complaint to the passengers or the public," the penalty being the same whichever class of persons had ground of complaint, it was held that a conviction, stating that the defendant permitted smoke to escape contrary to the by-law without stating any reasonable ground of complaint by the passengers or the public, was bad. But the same principle which makes a conviction bad for stating too little makes it bad if it states too much, as is the case here. Secondly, the justices had no power to amend the original record, which was bad for uncertainty.

Wethered, (*Avory*, *K.C.*, with him). The portion of s. 72 dealing with nuisances caused by placing things on the highway creates only two offences—one where the act causes injury to the highway, the other where it causes annoyance to passengers. Therefore there is no duplicity in the amended record, for it merely states the same offence twice over in different words.

Lushington, in reply.

LORD ALVERSTONE C.J. In my opinion the objection that this conviction as amended is bad by reason of its stating two offences cannot be sustained. Sect. 72 of the Highway Act provides that it shall be an offence, amongst other things, to "lay any timber, stone, hay, straw, dung, manure, lime, soil, ashes, rubbish, or other matter or thing whatsoever upon such highway to the injury of such highway or to the injury, interruption, or personal danger of any person travelling thereon." The common-sense interpretation of that passage is that it creates two offences, and not four. The injurious consequences of the prohibited acts are distributed into two classes—injury to the highway on the one hand, and to the travelling public on the other. The injury, interruption, or

(1) 24 Q. B. D. 634.

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personal danger of the passengers are grouped together as one class, and were, in my view, not intended to constitute different offences. So far as any argument is to be derived from the grammatical form of the sentence, the absence of the word "or" between "injury" and "interruption" points to that conclusion. If it had been intended to treat the act of placing substances on the highway to the interruption of the passengers as a distinct offence from a similar act done to the injury of the passengers, one would have expected to find the statement of those different offences separated by the word "or." As to the point that the justices had no power to amend the original record, that is sufficiently disposed of by our decision on the main point. For, there being but one offence created by this part of the section, the statement that the act was done to the interruption *or* personal danger of persons travelling thereon was a mere defect in form and not in substance, and the justices consequently had power to amend.

LAWRANCE and RIDLEY JJ. concurred.

Appeal dismissed.

Solicitors for the appellant: *Sismey & Cook, for Incledon, Alms & Newbery, Minehead.*

Solicitors for the respondent: *Rawle, Johnstone & Co., for Joyce, Davis & Risdon, Williton.*

J. F. C.

1905 ELIAS AND ANOTHER, APPELLANTS; DUNLOP, RESPONDENT.
Dec. 15.

Revenue—Excise—Licence to sell Beer by Retail—Soliciting or taking Order at Place other than that specified in Licence—Inland Revenue Act, 1867 (30 & 31 *Vict. c.* 90), *s.* 17.

A grocer, having an excise licence for the sale of beer by retail at one of his shops, took an order for beer at another of his shops in respect of which he had no such licence:—

Held, that he was liable to the penalty imposed by s. 17 of the Inland Revenue Act, 1867, upon persons who, without having a proper excise licence authorizing them so to do, take orders for spirits, wine, or other articles, for the dealing in, retailing, or selling whereof an excise licence is by law required.

CASE stated under the Summary Jurisdiction Acts by three justices of the county of Middlesex.

The appellants were summoned to answer an information preferred by the respondent, an officer of Inland Revenue, for a penalty under s. 17 of the Inland Revenue Act, 1867. (1) The information alleged that the appellants, being persons duly authorized by licences to sell beer by retail at certain premises in Harrow, did solicit, take, and receive, at other premises in Harrow, an order for beer by retail without having an excise licence in force authorizing them so to do.

(1) 30 & 31 Vict. c. 90, s. 17: "If any person shall solicit, take, or receive any order for spirits, wine, or other article, for the dealing in, retailing, or selling whereof an excise licence is by law required, without having in force a proper excise licence authorizing him so to do, he shall forfeit the penalty imposed by law upon a person dealing in, retailing, or selling such article without having an excise licence in force authorizing him so to do; and in any case in which the place of business or residence of the offender shall not be known to the officer of excise who shall exhibit any information for the recovery of such penalty as aforesaid, or, if known, shall be out of the United Kingdom, it shall be sufficient service of the notice and summons required to be given to a defendant by any law of excise if the same be left at the house or place where the offender shall have solicited, taken, or received any such order as aforesaid, addressed to such offender: Provided always, that nothing herein contained shall be deemed . . . . to impose a penalty upon a bona fide traveller taking orders for goods which his employer is duly licensed to deal in or sell."

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The following facts were admitted or proved:—The appellants were a firm of grocers carrying on business at two sets of premises in Harrow, one being in Greenhill Parade, and the other in High Street. In respect of their premises in High Street, they held licences as spirit dealers, spirit retailers in bottle, beer dealers, wine dealers, tobacco dealers, and also a retail beer licence to be consumed off the premises. In respect of their premises in Greenhill Parade, they held all the above licences except the retail beer licence. Both inside and outside their premises in Greenhill Parade they displayed crates of four quart flagons of beer, and inside they displayed the prices of the said beer per crate. The appellant R. Elias managed the premises in Greenhill Parade. All orders for beer taken there were forwarded to the premises in High Street for execution; the manager at the premises in High Street did or did not execute any order so forwarded at his discretion. No cash was accepted at the premises in Greenhill Parade in respect of any retail orders for beer. The crates kept in the Greenhill Parade premises were merely for display, and no retail orders were executed therefrom, all the beer being stored at the High Street premises. Invoices for retail beer orders were sent out from the High Street premises on a High Street premises' invoice when the orders had been accepted at Greenhill Parade, and the money paid for any such orders was paid to, and passed through the books of, the High Street premises.

The respondent went to the Greenhill Parade premises and ordered some groceries; at the same time he asked a shop assistant what beer he had, and the assistant shewed him a printed list quoting prices for crates containing four quart bottles. The respondent ordered four quart bottles of beer and asked that the groceries and beer should be sent together; the assistant said that the beer would have to come from the other shop, and that would delay the delivery; and the respondent then asked that the beer should be sent the next day. This order was in fact accepted at Greenhill Parade and was forwarded to the High Street premises, from which the beer was delivered the following day, together with the groceries, to the respondent. The respondent paid for the beer on delivery, and the money was

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paid to the High Street premises; one receipt was given to the respondent for the groceries and beer.

The justices were of opinion that the appellants had taken and received an order for beer by retail at the Greenhill Parade premises, without having in force a proper excise licence authorizing them so to do, contrary to s. 17 of the Inland Revenue Act, 1867, and accordingly convicted and fined the appellants. The question for the opinion of the Court was whether there was evidence upon which the justices could find that the appellants committed the said offence.

R. B. Murphy (*R. D. Muir* with him), for the appellants. The only question in this case is whether the soliciting or taking at the unlicensed premises of an order for beer by retail, the order to be executed at and the beer to be delivered from the licensed premises, is an offence under s. 17 of the Inland Revenue Act, 1867. It is submitted that it is not. That section says nothing about place or locality; it deals only with a person who solicits or takes an order without having a proper excise licence authorizing him so to do; and if the person has a licence, it is immaterial where the order is solicited or taken. The exemption, at the end of s. 17, of a bona fide traveller taking orders for an employer who is duly licensed shews that the section intends that orders may be solicited or taken at any place, if the person who solicits or takes them is duly licensed. Sect. 17 is aimed at agents who take orders without having any excise licence. Sect. 37 of the Excise Duties Act, 1860 (23 & 24 Vict. c. 113), deals specifically with the offence of selling beer by retail at a place other than that specified in the licence, and if s. 17 of the Act of 1867 had been aimed at a person taking orders at a place not specified in his licence, it would have used the same express language as the earlier Act. In *Killick* v. *Graham* (1) the proceedings were against an unlicensed agent soliciting orders for a person who had a licence, and any observations in that case as to the liability of the principal were unnecessary for the decision and were merely dicta. In this case the person who has a licence has been convicted, and if this conviction is correct, a wine merchant

(1) [1896] 2 Q. B. 196.

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who has a licence can be convicted if he solicits or takes an order anywhere except at his place of business. [He referred to *Stuchbery* v. *Spencer*. (1)]

S. A. T. Rowlatt, for the respondent. This conviction was right. By s. 9 of the Customs and Inland Revenue Act, 1890 (53 & 54 Vict. c. 8), every excise licence to carry on a trade or business shall only authorize the person to whom it is granted to carry on the trade or business in one set of premises to be specified in the licence. This question depends upon s. 37 of the Excise Duties Act, 1860, as well as upon s. 17 of the Act of 1867. Sect. 37 recites that doubts had arisen whether persons licensed to sell beer by retail were liable to any penalty for selling beer at any other place than the premises specified in the licence, and provides that if any person so sells beer "he shall be deemed to sell beer by retail without having an excise retail licence in force authorizing him so to do" and shall be liable to a penalty. Then s. 17 of the Act of 1867 in effect puts the soliciting, taking, or receiving of an order on the same footing as an actual sale; the meaning of that section is that a licensed person must not solicit, take, or receive orders at a place where he cannot sell. The case of *Killick* v. *Graham* (2) is an authority in favour of this view of s. 17, for there the Court clearly thought that the licensed principal would be liable, though the question to be decided was whether the other unlicensed person was liable. Under s. 17, if an order is taken at a place which is not licensed, both an agent, who takes an order, and the principal are liable, unless the order is taken by a bona fide traveller: *Stallard* v. *Marks*. (3)

R. B. Murphy replied.

LAWRANCE J. I think that in this case our judgment must be for the respondent. The case is not free from difficulty, and we have been referred to several authorities decided with respect to the question raised here. This case came before the justices in this way: The appellants carried on business as grocers at two sets of premises in Harrow. They held, among

(1) (1886) 55 L. J. (M.C.) 141. (2) [1896] 2 Q. B. 196.
(3) (1878) 3 Q. B. D. 412.

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other licences, a retail beer licence in respect of one set of premises, but not in respect of the other. At the premises in respect of which they did not hold a retail beer licence they displayed crates of four quart flagons of beer, and the prices of beer per crate. A customer at these premises, the respondent, inquired the price of beer, and the shopman took an order from him for four quarts of beer, saying that the order would have to be dealt with at the other premises in High Street. The order was sent on to, and the beer was then supplied from, the High Street premises. Now, the words of s. 17 of the Inland Revenue Act, 1867, are: "If any person shall solicit, take, or receive any order for spirits, wine, or other article, for the dealing in, retailing, or selling whereof an excise licence is by law required, without having in force a proper excise licence authorizing him so to do," he shall be subject to a penalty. The only proviso to that section which has been relied on is that which exempts a bona fide traveller taking orders for goods which his employer is duly licensed to sell; but it cannot be suggested in the present case that any question arises as to a bona fide traveller. The question is whether the appellants are liable for taking and receiving orders for beer at the Greenhill Parade premises, in respect of which they held no excise licence authorizing them so to do. The justices have found that the appellants took and received orders at the Greenhill Parade premises, and held that they did so without having a proper licence authorizing them so to do. I think that the justices were right in coming to that conclusion, and that this appeal must be dismissed.

RIDLEY J. I am of the same opinion. At first I felt considerable doubt, and for some time the argument for the appellants made me hesitate as to what our decision ought to be. Taking s. 17 by itself, it looks as if it did not refer to a place, but only to a person receiving an order for spirits, wine, or other article without having the proper licence. When, however, we look at the previous legislation and see what is the meaning of "a proper excise licence," I think that s. 17 does contain words which shew that it is dealing with a place. The previous legislation is to be found in s. 10 of the Excise Licences Act, 1825

(6 Geo. 4., c. 81), which provides that no one licence taken out under the Act shall authorize any person to carry on his trade in more than one set of premises; and in s. 37 of the Excise Duties Act, 1860 (23 & 24 Vict. c. 113), passed to remove doubts arising under the previous Act, which provides that a person selling beer by retail at any other house or place than that specified in his licence shall be deemed to sell beer by retail without having a licence in force authorizing him so to do. I think that s. 17 of the Act of 1867, when using the words "a proper excise licence," refers to those previous sections—that is to say, it refers to a licence which is local only, and of which there will be a breach if a sale is effected at any other place, and intends to extend the provisions relating to a sale to the receiving of an order. There were, I suppose, cases in which there was only an order and not a complete sale, so that a person taking an order at one house when he had only a licence for another house, was able to say that he had not sold at the house for which he had no licence. In such cases it was, I think, the intention of s. 17 to make the soliciting or taking of an order as much a breach of the previous Acts as the sale would have been. I cannot, therefore, accede to the argument put before us on behalf of the appellants. With regard to *Killick* v. *Graham* (1), upon consideration I think that the Court were there of opinion that the principal would himself have been liable for the breach of the Act, and that case removes any doubt which I felt. I agree, therefore, that this appeal must be dismissed.

Judgment for the respondent.

Solicitors for the appellants: *Neve, Beck & Kirby.*
Solicitor for the respondent: *Solicitor of Inland Revenue.*

(1) [1896] 2 Q. B. 196.

W. A.

1905
Dec. 8.

NICHOLLS *v.* MALIM.

Revenue—House Duty—Offices belonging to and occupied with Dwelling-house—Exemption in favour of Buildings occupied only for Purposes of Trade or Profession—48 Geo. 3, c. 55, Sched. B, r. 2—57 Geo. 3, c. 25, s. 1—House Tax Act, 1851 (14 & 15 *Vict. c.* 36), *Sched.—Customs and Inland Revenue Act*, 1878 (41 & 42 *Vict. c.* 15), *s.* 13, *sub-s.* 2.

The respondent was the owner and occupier of a dwelling-house with its appurtenances, and an office within the same curtilage as the dwelling-house, the office being used by him solely for the purpose of his profession as a solicitor. The dwelling-house fronted the public street, from which there was one common entrance both to the dwelling-house and the office by means of a passage under part of the dwelling-house to a yard at the back of the house; the office had been built in the yard at a later date than the dwelling-house itself. The front door of the house was in the passage, and there was an outer door at the end of the passage nearest to the street which was open all day, but was shut and locked at night, when all communication was cut off between the street and the whole of the premises, including both dwelling-house and office. There was no structural communication or covered passage between the dwelling-house and the office, which latter could only be reached from the dwelling-house by crossing the yard.

Held, that the office was occupied with, and constituted part of, the dwelling-house for the purpose of assessment to inhabited house duty, and that it did not fall within the exemption contained in s. 13, sub-s. 2, of the Customs and Inland Revenue Act, 1878, in favour of tenements occupied solely for the purposes of a trade, business, or profession.

Case stated by Commissioners of Income Tax upon appeal against an assessment to inhabited house duty. The respondent, a solicitor, had appealed against an assessment of 65*l.*, the total value of a dwelling-house, including the appurtenances, yards, washhouse, summer-house, garden, &c., and office, situate at Grantham, and claimed that the office was not liable to be included in the charge to inhabited house duty, and that the duty should be confined to the remainder of the premises. The following are the material facts found in the case:—

The premises consisted of a dwelling-house fronting the public street, with the usual domestic out-offices, yards and garden, &c., and also a building in the same curtilage, which was used by the respondent as an office only, for the purpose of his profession, as a solicitor, and as holder of his public

appointments, the respondent being the owner and occupier of the whole of the premises. On the south side of the dwelling-house, and under a portion of its upper stories was a passage three feet wide, leading from the street to the yard; the yard was also on the south side of the dwelling, and at the west end of the yard was the building used as an office. The front door of the house was in the passage, and on its north side, and at the end of the passage nearest the street was an outer door, which remained open all day, but was locked about 11 P.M.; the locking of this door shut off all communication between the street and the whole of the premises, including the dwelling and the office. The outer door had to be opened in the morning by one of the domestic servants before the respondent's clerks could get to the office. There was also another door in and across the passage on the inner side of the front door to the house, which was kept open during the day, but was locked at night earlier than the outer door next the street, the key being taken into the dwelling.

Access to the whole premises was obtained by the outer door next the street; to the dwelling, by the front door in the passage, and also by a back door leading out of the yard into the back part of the house, and reached by passing through the two doors in and across the passage; to the office, by a door opening into it from the yard, and also reached by passing through the same two doors in the passage. There was no internal communication whatever between the office and the dwelling, and the former could only be reached from the latter by going out of either the front door or back door, and crossing the yard, and entering the entrance door of the office.

The premises used as the dwelling were old, and the office was built long afterwards by the respondent, in what was then the yard of the house, for use as an office only; the office had never been used as a dwelling, and no one slept in it. The respondent could, if he chose, let off the dwelling to a tenant, retaining the office for his own purposes, or he could let the office and retain the dwelling. When the entrance door to the office from the yard was closed, no one from the dwelling could enter it. The respondent interviewed clients and officials on business matters in the house only on occasions when the office was closed. Letters,

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notices, and documents relating to business and official matters were, when the office was closed, delivered at the dwelling.

The respondent contended that in 48 Geo. 3, c. 55, Sched. B, r. 2, the word "out-houses" was used in the margin, shewing the intention of the rule that the words "all other offices" should mean offices ejusdem generis with those previously mentioned therein, viz., "coachhouse, stable, brewhouse, washhouse, laundry, &c., belonging to and occupied with any dwelling-house," and that it did not mean a building used entirely and separately for business purposes by a solicitor, and not used in connection with the dwelling. That the building, although in the same curtilage as the dwelling-house and garden, was a separate tenement or building, and not an out-house or office belonging to and occupied with the dwelling-house, and should not be valued with the dwelling-house, but that it was a distinct and separate tenement or building, and being occupied solely for professional purposes was therefore exempt from inhabited house duty by virtue of 57 Geo. 3, c. 25, 5 Geo. 4, c. 44, and 41 & 42 Vict. c. 15. (1)

The appellant (the surveyor of taxes) contended: (1.) That the office and dwelling constituted one house and subject-matter for assessment. (2.) That the office belonged to and was occupied with the dwelling-house, under Sched. B, r. 2, of the House Tax Act, 1808 (48 Geo. 3, c. 55), and was included within the words "household and other offices, yards and gardens therewith occupied and charged" in the schedule to the House Tax Act, 1851 (14 & 15 Vict. c. 36). (3.) That the office was not within the exemption granted by s. 13, sub-s. 2, of the Customs and Inland Revenue Act, 1878 (41 & 42 Vict. c. 15).

The Commissioners were of opinion that no liability to inhabited house duty existed in respect of the office, and restricted the assessment to the duty on 45*l.*, the annual value of the remainder of the premises. The surveyor of taxes appealed.

Sir E. H. Carson, S.-G. (*Rowlatt* with him), for the appellant. The decision of the Commissioners was erroneous; they were

(1) 5 Geo. 4, c. 44, although mentioned in the special case, was repealed by the Statute Law Revision (No. 2) Act, 1888 (51 & 52 Vict. c. 57).

misled by the fact of there being no direct internal communication between the dwelling-house and the office. By the schedule to the House Tax Act, 1851 (14 & 15 Vict. c. 36), the duty is described as being payable "for every inhabited dwelling-house which, with the household and other offices, yards and gardens therewith occupied and charged, is or shall be worth the rent of 20*l.* or upwards by the year," and r. 2 of Sched. B of the House Tax Act, 1808 (48 Geo. 3, c. 55), provides that "every coachhouse, stable, brewhouse, washhouse, laundry, woodhouse, bakehouse, dairy, and all other offices, and all yards, courts, and curtilages, and gardens and pleasure grounds, belonging to and occupied with any dwelling-house, shall, in charging the said duties, be valued together with such dwelling-house." The present case falls within these provisions. Primarily the office is part of the dwelling-house; it is all one house in reality, for the office is within the same curtilage and is occupied with the dwelling-house. The mere use to which the room is put cannot be the test of its liability to duty, if it is in fact used as one in connection with the dwelling-house. If the whole premises are not in reality one building, the structure in question, nevertheless, comes within the schedules of the Acts of 1808 and 1851.

The exemption contained in s. 13, sub-s. 2, of the Customs and Inland Revenue Act, 1878 (41 & 42 Vict. c. 15), in favour of houses or tenements "occupied solely for the purposes of any trade or business, or of any profession or calling by which the occupier seeks a livelihood or profit," has no application to the present case, for the office in question is part of a dwelling-house, and is not separately occupied apart from the dwelling-house. [He cited *Grant* v. *Langston* (1); *Browne* v. *Furtado* (2); *London and Westminster Bank* v. *Smith* (3); *Russell* v. *Coutts*. (4)]

The respondent did not appear.

WALTON J. The question which I have to decide is whether the respondent's office is to be included in the valuation of the dwelling-house; in other words, whether in point of fact the

(1) [1900] A. C. 383.
(2) [1903] 1 K. B. 723.
(3) (1902) 87 L. T. 244.
(4) (1881) 9 R. 261.

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Walton J.

office constitutes a part of the dwelling-house, which is the subject-matter of assessment.

In order to fall within the statute, the property must come within the description in the schedule of the House Tax Act, 1851, "an inhabited dwelling-house with household and other offices, yards and gardens therewith occupied." And consideration must also be given to the rules for Sched. B of the House Tax Act, 1808 (which are still applicable), r. 2 of which says that "every coachhouse, stable, brewhouse, washhouse, laundry, woodhouse, bakehouse, dairy, and all other offices, and all yards, courts, and curtilages, and gardens, and pleasure grounds, belonging to and occupied with any dwelling-house, shall, in charging the said duties, be valued together with such dwelling-house."

In the present case the office was within the same curtilage as the dwelling-house. I need not describe the premises in detail. There was only one entrance from the street, and it was common to the office and dwelling-house. The office and the dwelling-house were used together for the purpose of residence, and also for professional purposes; the house was at times used partly as an office, and the office was no doubt used exclusively for professional purposes. In a sense there was no structural communication between the house and the office; that is, the building of the office was not physically joined to the house, nor was there any covered passage between the two, though they were within the same curtilage. Persons going to either had to pass through the same external door, and to pass from one to the other had not to go outside the curtilage. I have come to the conclusion that unless the office falls within some exemption it must be included in the valuation of the dwelling-house.

That being so, the only exemption under which it is suggested that it is capable of being brought is that created by s. 13, sub-s. 2, of the Customs and Inland Revenue Act, 1878, which provides that "every house or tenement which is occupied solely for the purposes of any trade or business, or of any profession or calling by which the occupier seeks a livelihood or profit, shall be exempted from the duties by the said Commissioners upon proof of the facts to their satisfaction." In that sub-section "tenement"

includes part of a house. There is no doubt that the office was occupied solely for the purpose of a profession; the question therefore arises whether it was a "tenement" which was occupied solely for that purpose. The question of what kind of a tenement or what kind of a part of a house comes within sub-s. 2 has been considered in several cases, and amongst others in a Scotch case of *Russell* v. *Coutts* (1), and the view expressed by the Lord President on this point has been adopted in the House of Lords (2); it was in these words: "The meaning of the word 'tenement' in this statute is a part of a house so divided and separated as to be capable of being a distinct property or a distinct subject of lease." In the same case Lord Shand said: "I think the line must simply be drawn by looking at the particular premises, and ascertaining whether they are so structurally shut off from the rest of the building occupied as to form an entirely separate tenement of themselves." Obviously, that means, having regard to the existing conditions under which the premises are used and with such access as they now have to the street. I have come to the conclusion that this office is not so separate and so distinct as to be a tenement within the meaning of sub-s. 2, and that it is not entitled to the exemption given by that sub-section; this appeal must therefore be allowed.

Judgment for the appellant.

Solicitor for the appellant: *Solicitor of Inland Revenue.*

(1) 9 R. 261.
(2) See *Grant* v. *Langston*, [1900] A. C. 383, at pp. 392, 397.

W. J. B.

1905
Dec. 8.

LONDON COUNTY COUNCIL *v.* COOK.

Revenue—House Duty—Exemption—Dwellings for the Working Classes—"Separate Dwellings"—Revenue Act, 1903 (3 *Edw.* 7, *c.* 46), *s.* 11, *sub-s.* 1 (*a*).

The appellants were the owners of buildings erected by them under powers conferred by the Housing of the Working Classes Act, 1890, for the purpose of providing accommodation for men of the working classes. The three upper floors consisted of separate sleeping rooms or cubicles arranged round a central hall; not more than one man was allowed to occupy each cubicle, which could be locked on the inside. The ground floor contained dining and reading rooms, lodgers' kitchen, lavatories, and washhouse, which were used in common by the occupants of the cubicles, and also the quarters of the superintendent and staff. Each occupant paid sixpence a night for the use of the cubicle and of the other rooms and offices; he was not admitted to a cubicle before 7 P.M., and was obliged to vacate it before 8.30 A.M. on weekdays and 9 A.M. on Sundays; smoking and the use of lights in the cubicles were strictly prohibited:—

Held, that the cubicles, being only sleeping places, were not separate dwellings, and that the building, so far as it was used as a dwelling-house, was not used for the sole purpose of providing separate dwellings within the meaning of s. 11, sub-s. 1 (*a*), of the Revenue Act, 1903, and was not entitled to exemption from inhabited house duty.

Case stated by Commissioners of Income Tax upon an appeal against two assessments to inhabited house duty, of which and of a supplemental statement of facts the following are the material parts for the purposes of this report.

By s. 26, sub-s. 2, of the Customs and Inland Revenue Act, 1890 (53 & 54 Vict. c. 8), "the assessment to inhabited house duty of any house originally built or adapted by additions or alterations, and used for the sole purpose of providing separate dwellings for persons at rents not exceeding for each dwelling the rate of seven shillings and sixpence a week, and occupied only by persons paying such rents, shall be discharged by the said Commissioners provided that a certificate of the medical officer of health . . . . shall be produced to them to the effect that the house is so constructed as to afford suitable accommodation for each of the families or persons inhabiting it, and that due provision is made for their sanitary requirements. . . . ." By s. 4, sub-s. 1, of

the Customs and Inland Revenue Act, 1891 (54 & 55 Vict. c. 25), the words "where the annual value of each dwelling shall not amount to twenty pounds" were substituted for the words "for persons at rents not exceeding for each dwelling the rate of seven shillings and sixpence a week, and occupied only by persons paying such rents" in the above-recited section.

The Revenue Act, 1903 (3 Edw. 7, c. 46), by s. 17 repealed s. 26, sub-s. 2, of the Act of 1890, and s. 11 (which was enacted in its stead) is, so far as it is material to this case, as follows:—"(1.) Where a house, so far as it is used as a dwelling-house, is used for the sole purpose of providing separate dwellings—(*a*) the value of any dwelling in the house which is of an annual value below twenty pounds shall be excluded from the annual value of the house for the purpose of inhabited house duty." "(2.) The provisions of this section as respects dwellings of an annual value not exceeding forty pounds shall not take effect with regard to any such dwelling unless such a certificate as to accommodation and sanitary condition is produced . . . . as is mentioned in s. 26, sub-s. 2, of the Customs and Inland Revenue Act, 1890."

The premises forming the subject of the appeal were buildings erected by the appellants under the powers conferred by Part 3 of the Housing of the Working Classes Act, 1890, for the purpose of providing accommodation for men of the working classes. They contained accommodation for 343 men, and consisted of separate sleeping rooms or cubicles arranged on three landings round a central hall or covered yard, reading and dining rooms, scullery, lavatories, baths and washhouse, catering department, office, and quarters for superintendent and staff. The walls of the sleeping rooms or cubicles extended up to the ceilings, except upon the side nearest the landing, on which side there was an opening about eighteen inches high between the wall and the ceiling, for light and ventilation. The door of every sleeping room or cubicle was fitted with a bolt on the inside, and each sleeping room or cubicle provided separate and private sleeping accommodation for one man, not more than one man being allowed to occupy each. The occupant was allowed to use the other apartments and offices except the quarters for superintendent and

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staff. A charge of sixpence a night was made for each sleeping room or cubicle, and for use of the other apartments and offices, but many of the occupants had occupied the same sleeping room or cubicle for several years continuously. The sleeping rooms or cubicles were furnished, and were cleaned, and the beds therein made by the staff, and the halls (of which there were three) were used in common by the occupants of the sleeping rooms or cubicles, by way of access thereto. The other rooms used in common were on the ground floor, and communicated internally with the entrance hall. A separate locker for the use of each occupant was provided in a common room on the ground floor. The dining room was used in common by the occupants for taking their meals, which might be obtained at a shop on the premises or otherwise, and in the lodgers' kitchen, which was used by the occupants for the preparation of their food and for washing-up, was a hot plate, on which they were at liberty to cook their own food. Crockery, spoons, knives and forks were provided by the appellants for the use of such occupants as did not provide their own. The lavatories were used by the occupants in common for their personal ablutions. The bathrooms, which were separate and inclosed, were used separately by any occupant on payment of one penny. The washhouse was used in common by the occupants for cleansing their clothes.

There was a catering department, consisting of a kitchen and scullery (other than the lodgers' kitchen and scullery), in which food was prepared and cooked, a larder and storeroom, in which it was stored, and a shop; but the occupants of the sleeping rooms or cubicles were not allowed access to this department, except to the shop window, which opened into the dining room; cooked and uncooked food was sold at the shop to the occupants between 6 A.M. and 10 P.M., the catering arrangements being in the hands of the superintendent of the house.

The greater number of the occupants of the sleeping rooms or cubicles paid their rent each night, but many paid it weekly, and a large number had occupied sleeping rooms or cubicles for periods varying from thirteen years to three months. The rules provided (inter alia) that single-night tickets might be obtained, and also periodical tickets for a period not exceeding seven

nights; that lodgers should be admitted to the dormitories at intervals of a quarter of an hour from 7 P.M.; that cubicles must be vacated before 8.30 A.M. on week days and 9 A.M. on Sundays. Smoking or the use of lights in the cubicles and dormitories was strictly prohibited.

A certificate as to the accommodation and sanitary condition of the buildings had been given by the medical officer of health.

The appellants contended that the premises were a house used for the sole purpose of providing separate dwellings within the meaning of s. 26, sub-s. 2, of the Act of 1890, and s. 11, sub-s. 1, of the Act of 1903 (1), and that that description did not fail to apply to the premises merely because certain of the rooms were used as above stated in common by the dwellers in the house, and they relied on the decision in *Seaman* v. *Lee*. (2) The respondent contended that the premises were not such a house, and that *Seaman* v. *Lee* (2) did not apply.

The Commissioners held that the premises were not a house used for the sole purpose of providing separate dwellings, and confirmed the assessment.

Macmorran, K.C. (*Ryde* with him), for the appellants. The house was used for the sole purpose of providing separate dwellings of an annual value not exceeding 20*l.*, and is therefore exempt from assessment to inhabited house duty. The case of *Seaman* v. *Lee* (2) shews that a house may be used for the sole purpose of providing separate dwellings, although the separate dwellings are not structurally completely severed from each other, and that it is not deprived of its exemption from liability to inhabited house duty merely because certain parts of the house (in that particular case the staircase, washhouse, and coalcellar) are used in common. It is true that that decision proceeded upon s. 26, sub-s. 2, of the Act of 1890, but the alteration in wording

(1) The Revenue Act, 1903, which repealed s. 26, sub-s. 2, of the Customs and Inland Revenue Act, 1890, came into operation on September 1, 1903, and the assessments appealed against were made for the year ending April 5, 1904; but the appeal before the Commissioners was argued by both parties on the assumption that s. 26, sub-s. 2, of the Act of 1890 applied to the case.

(2) (1899) 68 L. J. (Q.B.) 593; 4 Tax Cas. 67.

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in the substituted section (s. 11, sub-s. 1, of the Act of 1903) is immaterial for the purpose of the present case; the material alteration being that under the earlier Act the whole house had to be used for the purpose of providing separate dwellings, while under the later Act that part of a house which is used for the provision of separate dwellings is exempt, its value being excluded from the annual value of the whole house for the purpose of inhabited house duty. Even if the whole house cannot be said to be used for providing separate dwellings, the exemption in the Act of 1903 applies, for the house, "so far as it is used as a dwelling-house," consists of the three upper floors, the ground floor being in effect a separate administration block used for office purposes, and possibly liable to duty. The three upper floors are solely used for the purpose of providing separate dwellings for those who inhabit them. The mere fact that servants reside on the ground floor does not take the three upper floors out of the exemption.

Sir E. H. Carson, S.-G. (*Rowlatt* with him), for the respondent. The cubicles are not exempt, for they are not separate dwellings; if they were, a fortiori would bedrooms in a hotel, and lodgings generally, be exempt; and it is difficult to see upon what principle bedrooms in private houses could be held not to fall within the exemption. Assuming, however, the cubicles to be separate dwellings, the duty is assessed upon the whole house, and, having regard to the facts, it is impossible to say that the whole house is used for the sole purpose of providing separate dwellings, for a dining room is as much used for a dwelling-house as is a bedroom. It is clear that the lower part of the house is used as a dwelling-house in common. But the cubicles are not separate dwellings, and their value cannot be excluded in assessing the value of the premises to the inhabited house duty. The occupant of one of these cubicles is not an occupier of a separate dwelling in any sense of the term; he has merely a licence to use it for sleeping purposes between certain prescribed hours; he cannot smoke, or even have a light, inside it, and it would be an abuse of language to call such cubicles separate dwellings. The case of *Seaman* v. *Lee* (1) is wholly different in its facts, for there each

(1) 68 L. J. (Q.B.) 593; 4 Tax Cas. 67

tenant had complete control over what might be called his dwelling. [He also cited *Smith* v. *Dauney*. (1)]

Macmorran, K.C., in reply, referred to *Riley* v. *Read*. (2)

WALTON J. I think that this is a reasonably clear case. It may be that houses of this character ought to have the benefit of some exemption, either total or partial. I have only to determine whether this particular house is exempt under the existing legislation. In order to bring this case within the statute, it seems to me that it is plainly necessary to make out that the cubicles in question are dwellings—that is, separate dwellings; if they are not, the case does not fall within it. The cubicles occupy the three upper floors of the house, and the rules regulating their use are shortly these: The charge for the use of a cubicle is sixpence a night; single-night tickets may be obtained, or periodical tickets for a period not exceeding seven nights, and expiring on or before Friday night. No cubicle is reserved after 9 P.M. unless previously paid for. Lodgers are admitted to the dormitories at intervals of a quarter of an hour from 7 P.M. and their tickets must be shewn at the entrance gate. Cubicles must be vacated before 8.30 A.M. on weekdays and 9 A.M. on Sundays. Smoking, or the use of lights, in the cubicles and dormitories is strictly prohibited, the dormitories being, I suppose, the galleries out of which the cubicles open. On the ground floor other accommodation is provided.

It seems plain to me that what is provided in the three upper floors of this house is sleeping accommodation only, while on the ground floor there is accommodation of a different kind, that is to say, reading and dining rooms, scullery, lavatories, baths, washhouse, catering department and servants' quarters. In my opinion, the cubicles are merely sleeping places, and cannot be properly styled separate dwellings. It has been contended for the appellants that a house is not an inhabited dwelling-house unless somebody sleeps in it, or at any rate that sleeping accommodation is the test to apply, in the sense that there must be accommodation for sleeping, whether anyone actually sleeps there or not; that a dwelling-house is not a

(1) [1904] 2 K. B. 186. (2) (1879) 4 Ex. D. 100.

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dwelling-house within the meaning of the Act of Parliament unless there is sleeping accommodation provided. But it does not necessarily follow that that which is a bedroom, and nothing but a bedroom, is a dwelling. As I am of opinion that these cubicles were mere sleeping places, and could not properly be said to be places in which anybody dwelt, it follows that they were not separate dwellings within the meaning of the section, and that this appeal must be dismissed.

Appeal dismissed.

Solicitor for the appellants: *Seager Berry.*
Solicitor for the respondent: *Solicitor of Inland Revenue.*

W. J. B.

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Dec. 6, 21.

ATTORNEY-GENERAL *v.* GLOSSOP.

Revenue—Estate Duty—Property passing on Death—Settlement—Finance Act, 1894 (57 & 58 *Vict. c.* 30), *s.* 5, *sub-s.* 3; *s.* 21, *sub-s.* 5—*Finance Act*, 1896 (59 & 60 *Vict. c.* 28), *s.* 14, *s.* 15, *sub-s.* 1.

By a marriage settlement property, described as the husband's fortune and the wife's fortune respectively, was settled by the husband and wife upon trust (inter alia) to pay during the joint lives of husband and wife an annuity of 400*l.* to the wife for her separate use without power of anticipation and to pay the residue of the income, and after the death of the wife the whole income, to the husband for life, and after his death to pay the whole income to the wife for life, and upon trust after the death of the survivor for children of the marriage, and failing children upon trust as to the husband's fortune for him, his executors, administrators and assigns, and as to the wife's fortune for her executors, administrators and assigns. There was no issue of the marriage, and the wife survived the husband:—

Held, that upon the death of the husband estate duty became payable upon the wife's fortune, except as to so much of it as formed part of the corpus which produced the annuity of 400*l.*

Attorney-General v. *Penrhyn*, (1900) 83 L. T. 103; *Attorney-General* v. *Strange*, [1898] 2 Q. B. 39, and *Attorney-General* v. *Wood*, [1897] 2 Q. B. 102, considered and applied.

INFORMATION, claiming estate duty.

The defendants were the trustees of the marriage settlement, dated November 18, 1873, of Samuel Francis Glossop Bythesea

and Mary Prideaux Mitchell. By the indenture of settlement it was recited that certain hereditaments, the property of the said S. F. G. Bythesea, and referred to as "the husband's fortune," had become vested in the trustees upon trust for sale and to stand possessed of the sale moneys upon the trusts of the marriage settlement; that certain hereditaments, the property of the said Mary Prideaux Mitchell, had become vested in the trustees subject to the life estate of her mother upon trust for sale after the marriage and to stand possessed of the sale moneys upon the trusts of the marriage settlement; that certain sums of money, securities, and stock, the property of Mary Prideaux Mitchell, had become vested in or had been transferred to the trustees; that Mary Prideaux Mitchell was entitled to certain other securities and property, subject as to certain parts thereof to her mother's life interest; all the property to which Mary Prideaux Mitchell was entitled being described as "the wife's fortune." It was then declared and agreed that the trustees should after the marriage stand possessed both of the husband's fortune and the wife's fortune upon trust to invest the same and out of the income arising therefrom to pay during the joint lives of the husband and wife an annuity of 400*l.* to the wife for her separate use without power of anticipation, and subject thereto to pay the residue of the income, and after the decease of the wife to pay the whole thereof, to the husband during his life, and after his decease to pay the whole income to the wife for life; and after the decease of the survivor upon trust for the children of the marriage; and on failure of issue the trustees were to stand possessed of the husband's fortune in trust for the husband, his executors, administrators and assigns, and of the wife's fortune upon trust, if she were the survivor, for her executors, administrators and assigns, but if she should die in the lifetime of her husband in trust for such person as she should by will appoint, and in default of appointment for the persons who at the time of the failure of the trusts would be entitled under the Statutes of Distribution in case she had died intestate and without having been married.

There was no issue of the marriage. On May 3, 1904, the husband died, and his will was duly proved. Estate duty was

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paid upon the value of the property settled by him, and referred to as the husband's fortune, but not upon any part of the property in the settlement referred to as the wife's fortune.

The Crown claimed that under these circumstances estate duty under the provisions of the Finance Act, 1894, became payable on the death of the husband in respect of the principal value of the property settled by the wife and referred to as the wife's fortune, with the exception of a small part in which there was an existing life interest, and an account was prayed to ascertain the amount of estate duty and interest therein payable in respect of the said property.

By their answer the defendants contended that estate duty did not become payable on the death of the husband in respect of the principal value of any part of the wife's fortune.

Sir R. B. Finlay, A.-G., and *Vaughan Hawkins*, for the Crown. The case is governed by *Attorney-General* v. *Penrhyn* (1), all the material facts being identical in the two cases, and therefore s. 15, sub-s. 1, of the Finance Act, 1896, affords no defence to the claim for estate duty, the case not falling within the exemption contained in that sub-section. Estate duty attaches on the wife becoming absolutely entitled to the settled property. There are two conditions which must be fulfilled before s. 15, sub-s. 1, can attach; first, the life tenant must retain possession to the entire exclusion of the disponer during the duration of the terminable interest; and, secondly, no other interest must be created by the disposition. In the present case neither of those conditions is fulfilled, for the annuity of 400*l.* was reserved to the wife out of the estate while in the possession of the husband, and the settlement vested an interest in any children that there might be of the marriage. [They also cited *Egerton* v. *Earl Brownlow*. (2)]

Danckwerts, K.C., and *Austen Cartmell*, for the defendants. *Egerton* v. *Earl Brownlow* (2) is not in point; but it is admitted that the case is to a certain extent covered by *Attorney-General* v. *Penrhyn*. (1) In that case it was held by Grantham J., whose view is binding in this Court, the dissenting judgment of Phillimore J. having been withdrawn, that, although no children

(1) 83 L. T. 103.

(2) (1853) 4 H. L. C. 1.

of the marriage ever in fact came into existence, there was another interest than the life interest created by the settlement within the meaning of s. 15, sub-s. 1, of the Finance Act, 1896. In the present case there is the further point that, under s. 21, sub-s. 5, of the Finance Act, 1894, estate duty is not payable until the death of the survivor. On this point *Attorney-General* v. *Strange* (1) is an authority, but is distinguishable; in that case there was no annuity, and the Court acted on the view that the corpus passed to the wife absolutely at the husband's death, while here the wife has the life interest on the husband's death, and is not entitled to the corpus unless she calls for a conveyance of it.

Further, assuming that neither of the sections already cited is applicable, s. 5, sub-s. 3, of the Finance Act, 1894, operates to exempt so much of the trust fund as is required to produce the annuity of 400*l.*, and in any event that section and s. 14 of the Finance Act, 1896, exempt so much of the corpus producing the annuity as is attributable to the wife's fortune; the husband's fortune and the wife's fortune may be dealt with separately, and the settlement treated as one of proportionate parts of the husband's property and the wife's property sufficient to produce the annuity. The present case is distinguishable from *Attorney-General* v. *Strange* (1) because there is nothing in the settlement to destroy the original life interest of the wife, and the effect of the sections is to impose a charge on the reversion at the death of the wife, and to prevent the life interest and the reversion from uniting so as to entitle her to call for a conveyance of the corpus.

Sir R. B. Finlay, *A.-G.*, in reply. For the purpose of estate duty the question arising on s. 21, sub-s. 5, of the Finance Act, 1894, is in whom is the beneficial interest; here it is obviously in the widow, for she has the life interest, and on her death the corpus of her property goes at once to her executors. The effect of the section is not to create a charge, but to postpone payment of estate duty until after the death of the wife in cases where she has nothing but a life interest. The question arising on this section is concluded by *Attorney-General* v. *Strange* (1) in favour

(1) [1898] 2 Q. B. 39.

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of the Crown. Nor does s. 5, sub-s. 3, of the Act of 1894 exempt the defendants from liability to estate duty on so much of the corpus as represents the annuity of 400*l*. Applying the decision in *Earl Cowley* v. *Inland Revenue Commissioners* (1), the annuity ceases on the death of one of the joint lives, and the whole property then passes to the survivor. The sub-section does not apply to such a case, but to a case where there is an annuity with a direct remainder over. And, further, the sub-section only applies where subsequent limitations under the settlement continue to subsist. It is true that in *Attorney-General* v. *Wood* (2), it was held that subsequent limitations continued to subsist, although the survivor had become absolutely entitled, but that does not apply to the present case, where the wife did not become absolutely entitled but retained her original life interest. Nor can the defendants bring themselves within s. 14 of the Finance Act, 1896, which raises a very similar point confined to so much of the annuity as is attributable to the wife's fund. The annuity cannot be apportioned in the way suggested between the property of the husband and the property of the wife. The section applies only where property is settled by a person on himself for life, and here it is not so settled.

Danckwerts, K.C. The case of *Attorney-General* v. *Wood* (2), is conclusive, the point being specifically dealt with by Vaughan Williams L.J. in his judgment. (3)

Cur. adv. vult.

Dec. 21. The following judgment was read by

WALTON J. This is a claim for estate duty alleged to be payable on the death of Samuel Francis Glossop Bythesea, who died on May 3, 1904, and the claim arises upon the settlement, made on Nov. 18, 1873, upon his marriage to Mary Prideaux Mitchell. The effect of the marriage settlement is, shortly, this. Certain properties, described respectively as the "husband's fortune" and the "wife's fortune," were settled upon trustees on trust, subject to certain life interests, to sell and invest and pay out of the income during the joint lives of husband and wife an annuity of

(1) [1899] A. C. 198. (2) [1897] 2 Q. B. 102.
(3) [1897] 2 Q. B. 109.

400*l.* to the wife, and the residue of the income during the life of the wife to the husband, and after the death of the wife, if the husband survived her, to pay the whole income to the husband for life, and after the death of the husband, if the wife survived him, to pay the whole income to the wife for life, and after the death of the survivor upon trust for children of the marriage, and failing children, that the trustees should after the death of the husband and the wife stand possessed of the husband's fortune in trust for the husband, his executors, administrators and assigns, and should stand possessed of the wife's fortune upon trust if the wife should survive the husband for her executors, administrators and assigns. It is unnecessary to refer to certain life interests to which persons other than the wife were entitled, as no question arises with regard to them. There was no issue of the marriage, and the wife survived the husband. Estate duty has been paid on the property described as the husband's fortune, but not upon the wife's fortune included in the marriage settlement. The question is whether estate duty is payable on the wife's fortune.

It is not disputed that the wife's fortune passed on the death of the husband, and estate duty is payable in respect of it unless the case can be brought within one or other of the saving enactments relied on by the defendants. It can scarcely be said that s. 15, sub-s. 1, of the Finance Act, 1896, was relied on by the defendants, because it cannot be doubted that if I am bound by the decision of the Divisional Court in *Attorney-General* v. *Penrhyn* (1), the present case is within it. Sect. 15, sub-s. 1, of the Act of 1896 is as follows: "Where by a disposition of any property an interest is conferred on any person other than the disponer for the life of such person or determinable on his death, and such person enters into possession of the interest and thenceforward retains possession thereof to the entire exclusion of the disponer or of any benefit to him by contract or otherwise, and the only benefit which the disponer retains in the said property is subject to such life or determinable interest, and no other interest is created by the said disposition, then, on the death of such person after the commencement of

(1) 83 L. T. 103.

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this part of this Act, the property shall not be deemed for the purpose of the principal Act to pass by reason only of its reverter to the disponer in his lifetime." If I am bound by that case s. 15, sub-s. 1, affords no defence to the claim of the Crown. It is open to the defendants to contend in the Court of Appeal that the judgment in that case was wrong, but I think that I am bound by it.

The next enactment which I have to consider is s. 21, sub-s. 5, of the Finance Act, 1894. As applied to the facts of the present case, the sub-section may read as follows: "Where the husband is entitled to the income of property settled by his wife, and on his death the wife becomes entitled to the income of the property settled by her, estate duty shall not be payable in respect of that property until the death of the wife." The husband in the present case died, and there were no children. Under these circumstances, what did the survivor, the wife, become entitled to? Following the form of the settlement, the trustees on the death of the husband stood possessed of the property settled by the wife—that is, the "wife's fortune" and also of the "husband's fortune"—in trust to pay the income of the husband's fortune and the wife's fortune to the wife during her life, and upon her death, as to the husband's fortune, for the husband, his executors, administrators and assigns, and as to the wife's fortune for the executors, administrators and assigns of the wife. It is only as to the wife's fortune that any question arises in this case. On the death of the husband the trustees stood possessed of the wife's fortune in trust to pay the income to the wife during her life and after her death for her executors, administrators and assigns. If it is permissible to consider the wife's fortune separately from the husband's fortune, it seems to me that on the husband's death the wife became entitled absolutely not only to the income, but also to the corpus of the property described as the wife's fortune. And I see no reason why the wife's fortune should not be dealt with separately. It seems to me that the present case is governed by the judgment of the Court of Appeal in *Attorney-General* v. *Strange*. (1) I think that on the death of the

(1) [1898] 2 Q. B. 39.

husband the wife was entitled to say to the trustees, "I am entitled to the property described as the wife's fortune; give it to me." In the words of Lord Lindley in *Attorney-General* v. *Strange* (1): "They obviously have no choice in the matter. If she were to bring an action against them to compel them to transfer the funds they would clearly have to pay the costs." If this be so and she became entitled on the death of her husband not merely to the income, but also to the corpus of the property, then, following *Attorney-General* v. *Strange* (1), I must hold that the present case is not within s. 21, sub-s. 5.

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The next section relied upon by the defendants is s. 5, sub-s. 3, of the Finance Act, 1894. It is in these words: "In the case of settled property, where the interest of any person under the settlement fails or determines by reason of his death before it becomes an interest in possession, and subsequent limitations under the settlement continue to subsist, the property shall not be deemed to pass on his death." It is said that this section applies, not to the whole of the wife's fortune, but to the capitalized value of the annuity of 400*l.* a year. It is said that the husband had an interest in this property as he would have been entitled under the settlement to the income of it —that is, to 400*l.* a year—during his life if he had survived his wife; that this interest failed by reason of his death before it became an interest in possession, and the subsequent limitations to the wife continued to subsist. I think that the husband had an interest under the settlement, which failed by reason of his death before it became an interest in possession. But it is necessary to consider what interest he had which failed. What would he have been entitled to if he had survived his wife? The corpus out of which the 400*l.* a year was payable was made up in part of the husband's fortune and in part of the wife's fortune. As I have already held, the husband's fortune may be considered separately from the wife's fortune. As to so much of this corpus producing 400*l.* a year as was part of the husband's fortune, the trustees on the death of the wife would, if the husband had survived her, have held it on trust for the husband for life, and on his death for his executors, administrators and assigns. In

(1) [1898] 2 Q. B. 39.

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other words, as I have held with regard to the "wife's fortune," the husband on the death of the wife would have been entitled to this part of the corpus absolutely. It appears to me that his interest in this part of the corpus producing the 400*l.* a year did not fail on his death. On the wife's death it would still belong to him, his executors, administrators and assigns. But as to so much of the corpus producing the 400*l.* a year as was part of the "wife's fortune" the case is different. If he had survived his wife he would have been entitled to a life interest in this, and this interest failed on his death before it became an interest in possession. The question remains whether as to this any subsequent limitations continued to subsist after the death of the husband. I have already held in effect that upon the death of the husband the wife became entitled to this property absolutely. But it appears to me that, if this be so, it has been decided in *Attorney-General* v. *Wood* (1) that in such a case a limitation under the settlement does continue to subsist within the meaning of s. 5, sub-s. 3. In my judgment, therefore, so much of the "wife's fortune" as formed part of the capital which produced the income of 400*l.* a year must not be deemed to have passed on the husband's death. In order to arrive at the amount an apportionment will be necessary. There will probably be no difficulty in making the apportionment. I think it can be made, and if any difficulty arises with regard to it I must deal with it. For this purpose there must be liberty to apply. The Attorney-General contended that the judgment of the House of Lords in *Earl Cowley* v. *Inland Revenue Commissioners* (2) afforded an answer to the contention of the defendants upon s. 5, sub-s. 3. It is quite clear that this section was not referred to in the arguments or judgments in *Earl Cowley's Case.* (2) And I think it had no application to the facts in that case. *Earl Cowley's Case* (2) shews that if s. 5, sub-s. 3, did not apply to the facts of this case no deduction could be made in considering what property passed on the death of the husband in respect of the annuity of 400*l.* a year payable to the wife during the lifetime of the husband. *Earl Cowley's Case* (2) is not an authority upon the construction of s. 5, sub-s. 3.

(1) [1897] 2 Q. B. 102. (2) [1899] A. C. 198.

It is scarcely necessary to consider the other enactment which was relied upon by the defendants. This was s. 14 of the Finance Act, 1896. This section admittedly can apply only to so much of the "wife's fortune" as formed part of the corpus which produced the income of 400*l.* a year. And it seems to me to apply only where the property in question is settled on the settlor for life. In the present case the property in question was not settled by the wife on herself for life. It was settled upon herself for the joint lives of herself and her husband. But, however this may be, if the defendants are right under s. 5, sub-s. 3, of the Act of 1894, it is unnecessary for them to rely on s. 14 of the Act of 1896.

The result of my judgment is that the Crown is entitled to succeed except as to so much of the "wife's fortune" as is her share of the capitalized value of the fund which produced the income of 400*l.* a year. Each party must pay its own costs.

Judgment accordingly.

Solicitor for the Crown: *Solicitor of Inland Revenue.*
Solicitors for the defendants: *Young, Jones & Co.*

W. J. B.

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Dec. 4, 20.

YSTRADYFODWG AND PONTYPRIDD MAIN SEWERAGE BOARD *v.* BENSTED (SURVEYOR OF TAXES).

Revenue—Income Tax—Sewer—Vested in Local Authority—"Hereditament"—"Capable of actual Occupation"—Income Tax Act, 1842 (5 & 6 *Vict. c.* 35), *s.* 60, *Sched. A*, *Rules No.* 1, *No.* 3.

A sewer vested in and under the control of a local authority is for the purpose of income tax a hereditament capable of actual occupation, and is chargeable in respect of the annual value thereof according to Sched. A, Rule No. 1.

Quære, whether if the local authority made a profit out of the user of the sewer by other local authorities, the annual value would, under Rule No. 3, be the profit so made.

Case stated under 43 & 44 Vict. c. 19, s. 50, by the Commissioners for the general purposes of the Income Tax Acts for the district of Newport, in the county of Monmouth.

The following facts were admitted or proved:—

At a meeting of the Income Tax Commissioners for the district of Newport the appellants appealed against an assessment made upon them in the parish of Rumney for the year ending April 5, 1905, of 800*l.* (gross) under Sched. A of 16 & 17 Vict. c. 34, on lands, tenements, &c., in respect of the property of the appellants in the parish of Rumney.

The appellants, as will be seen by the report of *Ystradyfodwg and Pontypridd Main Sewerage Board* v. *Newport Assessment Committee* (1), to which report the Court is referred, are the governing body of a united drainage district consisting of the urban district of Rhondda (formerly known as Ystradyfodwg) and the urban district of Pontypridd, constituted by virtue of a Provisional Order of the Local Government Board dated June 4, 1885, and duly confirmed by the Local Government Board's Provisional Orders Confirmation (No. 7) Act, 1885, for the purpose of carrying into effect a system of sewerage for the use of the said urban districts, and it was provided by art. 19 of the Order that all sewers made by the appellants should vest in and be under the control of the appellants. Pursuant to the powers

(1) [1901] 1 Q. B. 406.

vested in them by this Order the appellants designed and constructed, and have since always maintained, a certain sewer or sewage carrier for the use of the district, and have erected, maintained, and worked such works, machinery, and plant as were required for conveying the sewage of the district to the sea. The total length of the sewer or sewage carrier is about seventeen and a quarter miles, whereof nearly two and a half miles passes through or over land situated in the parish of Rumney, which land (except such part as forms part of the foreshore of the Bristol Channel) was previously to the construction of the sewer or sewage carrier, and still is, rated and assessed for the relief of the poor. The construction of the sewer or sewage carrier within the parish is as follows: 182 yards of iron pipes carried on concrete arches above the surface of the ground, 1021 yards of pipes laid below the surface and ordinary level of the ground, 1890 yards carried below the surface of the ground, but covered by an artificial embankment of varying height, which rises above the level of the adjacent land, and 1246 yards of pipes (hereinafter called the outfall) passing partly over and partly beneath the surface of the foreshore of the Bristol Channel. In connection with the outfall certain works have been erected by the appellants.

For the purpose of obtaining money for making and maintaining the sewer or sewage carrier and the necessary works appurtenant thereto, the appellants, in accordance with the provisions of the Public Health Act, 1875, borrowed the sum of 156,000*l.* from the Public Works Loan Commissioners, to be repaid with interest at the rate of $3\frac{1}{2}$ per cent. per annum by equal payments extending over thirty years. The proportion of the annual repayment payable in respect of the portion of the sewer or sewage carrier situate in the said parish of Rumney amounted to the sum of 1210*l.* These annual payments (except as to such portions as are received from the district councils and corporations hereinafter mentioned) are raised by means of rates levied by the appellants within the area of their district.

Under the Local Government Board's Provisional Orders Confirmation (No. 8) Act, 1896, the appellants obtained powers

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enabling them, with the consent of the Local Government Board, to allow the sewers of the council of any county, borough, or district to communicate with the sewer or sewage carrier vested in the appellants. In pursuance of these powers, and with the consent of the Local Government Board, agreements had, previously to the date of the making of the assessment now appealed against, been made with the Dinas Powis Urban District Council, the Caerphilly Urban District Council, and the Cardiff Corporation whereby the sewage of the districts under the control of these local bodies was to be received in and carried away by the sewer or sewage carrier of the appellants upon payment to them by the local bodies of the sums levied upon the respective rateable values of the districts in question at the rate of $3\frac{3}{4}d.$, $4d.$, and $3\frac{1}{2}d.$ in the pound per annum respectively. The sum received from the last-mentioned sources during the financial year covered by the assessment appealed against amounted to 943*l.* 19*s.* 7*d.*, and in consequence of receiving these sums from the three said local bodies the appellants are enabled to raise sufficient money for the purpose of repaying the annual instalments of the money borrowed as aforesaid to make and maintain the sewer or sewage carrier and the works, machinery, and plant connected therewith in the parish of Rumney and elsewhere by two precepts at the rate of $2\frac{1}{2}d.$ in the pound in each year upon the entire area of the appellants' sewerage district. The rate in the pound in the last-mentioned area would presumably have to be increased in order to prevent the appellants incurring loss owing to their yearly expenditure in connection with the sewer or sewage carrier if the money received by the rates levied outside the said area as aforesaid, being money paid for the use of the sewer or sewage carrier, was not available for use by the appellants. But the appellants allege that no apportionment has been made of the sums received from the three outside local authorities in respect of the part of the sewer or sewage carrier within the parish of Rumney, and no estimate has been made of the cost incurred by the appellants to earn the contributions of the said three local bodies.

The seat of management of the appellants' concern, and the place where its accounts are usually made up, is the town of

Pontypridd, which is not in the same district for income tax purposes as the said parish of Rumney.

The assessment against which the appellants appeal is in respect of so much of their property as lies within the said parish of Rumney. No other part of the undertaking of the appellants has been assessed for income tax under Sched. A.

At the hearing before the Commissioners the appellants alleged that under the circumstances set forth they had not any land in the parish of Rumney, and that their interests in the realty were easements only acquired for the purpose of the sewer or sewage carrier. If the whole superficial area occupied by the sewage carrier were on the surface of the ground it would amount to about one and a half acres. Throughout the whole of its course in the parish of Rumney the sewer or sewage carrier (except as to the portion over the foreshore) runs over, through, or under purely agricultural land, and the use of such land for agricultural purposes is not materially interfered with by the carrier, for even in the case of the embankment, which varies in height from eighteen inches to six feet above the ground through which it passes, it is covered throughout by a mound of earth which is overgrown with permanent grass pasture, except where a footpath runs over the top of the mound, and where manholes are placed. It is not separated by any fence from the adjoining land, and cattle have full access upon and across it throughout its entire length. The appellants derive no income from the sewer in the parish of Rumney or the land in connection therewith, except such portion of the payments received by them from the Dinas Powis and Caerphilly District Council and the Cardiff Corporation as may be properly apportioned to the sewer or sewage carrier within the parish of Rumney, and derive no benefit from the sewer or land in the parish except in so far as they constitute part and are used for the purpose of the appellants' sewerage works. The rack rental at which the lands adjoining are worth to be let by the year does not exceed 2*l.* per acre. No change has been made by reason of the construction of the appellants' sewer or sewage carrier in the assessment under Sched. A of the owners or the occupiers of the lands over, through, or under which the sewer is placed, and such owners or occupiers are still

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assessed on the basis of their ownership and occupation of such land. The appellants are assessed to the relief of the poor for that portion of the sewer or sewage carrier with the outfall and appurtenances thereof situated in the parish of Rumney at 800*l.* gross estimated value and 700*l.* rateable value.

Upon these facts it was contended on behalf of the appellants:—(1.) That the appellants' concern is one which falls within 5 & 6 Vict. c. 35, s. 60, Sched. A, Rule No. 3; (2.) that the appellants are not chargeable to income tax under Rule No. 1 of Sched. A in respect of the annual value of realty, from which no income or benefit is derived beyond the general profits of the concern to which such realty belongs; (3.) that so far as the appellants are chargeable they are chargeable upon the concern as a whole under Rule No. 3 of Sched. A in accordance with the rules prescribed by Sched. D pursuant to 29 & 30 Vict. c. 36, s. 8; (4.) that so far as the appellants are chargeable the place of assessment is under 5 & 6 Vict. c. 35, s. 60, Rule No. 4, par. 1, in the town of Pontypridd, where the accounts of the concern are usually made up; (5.) that the interest of the appellants in the subject of assessment is only an easement which is not a "hereditament" within Sched. A, Rule No. 1, which can be let at a rackrent, and that the appellants are neither owners nor occupiers of the land; (6.) that the land is already assessed to the income tax upon other persons in respect of the property thereof, and so far as the land is increased in the annual value by the appellants' use of the easements over the land, such other persons are the persons to be assessed; (7.) that the beneficial enjoyment of the land as such is in the adjoining owners and occupiers, and the appellants derive no benefit from it as land; (8.) that if, contrary to what the appellants contend, they are chargeable under Sched. A in respect of the annual value of the land, then in the alternative they contend that that annual value for the year ending April 5, 1905, is to be ascertained by reference to the adjoining land, which is purely agricultural land, and the rackrent at which the same is worth to be let as agricultural land, and inasmuch as the acreage of the land covered by this assessment is one and a half acres or thereabouts, and the rackrent of the adjoining land does not exceed

2*l.* per acre, the assessment should be upon that basis; (9.) that the poor-rate assessment upon the subject-matter claimed to be chargeable has no application to the appellants' undertaking.

It was contended by the surveyor of taxes, on behalf of the Crown, as follows:—(1.) That the sewer and works of the appellants constituted a hereditament within the meaning of Rule No. 1, Sched. A; (2.) that the sewer and works are capable of actual occupation and do not constitute an easement only; (3.) that the case before mentioned (*Ystradyfodwg and Pontypridd Main Sewerage Board* v. *Newport Assessment Committee*) (1) establishes the fact that the sewer and works are a rateable hereditament; (4.) that the sewer and works are not a trading concern arising out of lands within the meaning of Rule No. 3, Sched. A, and do not fall within the description of works mentioned in Rule No. 3, Sched. A, and the surveyor quoted the case of *Edinburgh Southern Cemetery Co.* v. *Solicitor of Inland Revenue* (2), and he referred to Lord M'Laren's judgment in the case to the effect that too wide an extension should not be given to the general words in Rule No. 3, Sched. A, and to the further effect that he, Lord M'Laren, "should not be disposed to hold that any unnamed business or trade carried on by the use of land would fall under r. 3, if it were possible by fair construction to bring it within r. 1 or r. 2, which relate to heritable estate which is either let or is occupied for purposes for which a rent would be a proper equivalent," and that it was possible to give such separate value in this case as in fact has been decided by the before-mentioned case of *Ystradyfodwg and Pontypridd Main Sewerage Board* v. *Newport Assessment Committee* (1); (5.) that the sewer and works do not fall within the terms "docks, drains and levels" mentioned in the general words of Rule No. 3: the drains there mentioned are drainage works of land and of the same nature as levels, such as the Bedford Level; (6.) that the annual value of the sewer and works does not depend upon the amount of use, and is thus clearly distinct from the concerns mentioned in Rule No. 3, Sched. A, where the value depends on the work done.

Upon these facts the Commissioners held: (1.) That the

(1) [1901] 1 Q. B. 406. (2) (1889) 27 Sc. L. R. 71, at p. 77.

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appellants' concern was not one which fell within 5 & 6 Vict. c. 35, s. 60, Sched. A, Rule No. 3, and was not chargeable as a whole in respect of its profits in accordance with the rules prescribed by Sched. D; (2.) that the appellants were chargeable in respect of the portion of their sewer and works in the parish of Rumney under Sched. A in respect of the annual value thereof according to Sched. A, Rule No. 1. The Commissioners accordingly confirmed the assessment.

The question of law for the opinion of the Court was whether the determination of the Commissioners was right in point of law. (1)

Evans, K.C. (*Redman* with him), for the appellants. The case involves two questions—first, as to the liability of the appellants to be assessed for income tax in respect of the sewer; and, secondly, if the appellants are liable, whether the assessment should be under

(1) Income Tax Act, 1842 (5 & 6 Vict. c. 35), s. 60: "The duties hereby granted and contained in the said Schedule marked (A) shall be assessed and charged under the following rules . . . . Schedule (A), No. I.—General Rule for estimating lands, tenements, hereditaments, or heritages mentioned in Schedule (A). The annual value of lands, tenements, hereditaments, or heritages charged under Schedule (A) shall be understood to be the rent by the year at which the same are let at rackrent, if the amount of such rent shall have been fixed by agreement commencing within the period of seven years preceding the 5th day of April next before the time of making the assessment, but if the same are not so let at rackrent, then at the rackrent at which the same are worth to be let by the year; which rule shall be construed to extend to all lands, tenements, and hereditaments or heritages, capable of actual occupation, of whatever nature, and for whatever purpose occupied or enjoyed, and of whatever value, except the properties mentioned in No. II. and No. III. of this Schedule."

No. III.—"Rules for estimating the lands, tenements, hereditaments, or heritages hereinafter mentioned, which are not to be charged according to the preceding general Rule.

"The annual value of all the properties hereinafter described shall be understood to be the full amount for one year, or the average amount for one year, of the profits received therefrom within the respective times limited . . . . Third.—Of ironworks, gasworks, salt springs or works, alum mines or works, waterworks, streams of water, canals, inland navigations, docks, drains, and levels, fishings, rights of markets and fairs, tolls, railways and other ways, bridges, ferries, and other concerns of the like nature, from or arising out of any lands, tenements, hereditaments, or heritages, on the profits of the year preceding."

Rule No. 1 or Rule No. 3 of Sched. A. On the first point the appellants' contention is that the appellants' interest in the sewer does not amount to the ownership of a hereditament, capable of actual occupation, within r. 1. The sewer is vested in the appellants by art. 19 of the Provisional Order, 1885, and the appellants are no doubt the owners of the actual pipes constituting the sewer, but the pipes, not being real property, are not assessable under r. 1. The vesting of the sewer in the appellants does not make them the owners or occupiers of the land displaced by or surrounding the pipes; they have such ownership and such rights only as are necessary for the duties of the appellants with respect to the provision and maintenance of the sewer: *Bradford* v. *Eastbourne Corporation* (1), *per* Lord Russell of Killowen, C.J. In that case the Court was considering the effect of the word "vest" in s. 13 of the Public Health Act, 1875, and the effect of art. 19 of the Provisional Order in this case is precisely the same. It has also been held in the case of streets, which by s. 149 of the Public Health Act, 1875, are vested in the local authority, that though something more than an easement is acquired, the property of the local authority in the street is of a very special and limited character, and does not include the sub-soil: *Rolls* v. *Vestry of St. George the Martyr, Southwark* (2); *Tunbridge Wells Corporation* v. *Baird*. (3) Those authorities shew that the appellants' property in the sewers is an incorporeal hereditament, and therefore not assessable under r. 1, but if sewers are assessable to income tax, it would seem to follow as a matter of principle that streets are assessable also. Secondly, if the appellants are liable to be assessed at all, the assessment should be made under Rule No. 3. The sewer is a concern of like nature to those mentioned in the third part of that rule: *Paddington Burial Board* v. *Inland Revenue Commissioners* (4); *Edinburgh Southern Cemetery* v. *Kinmont*. (5) At present the appellants derive no profits from the sewer, and will only do so at the end of thirty years, when the loan will have been repaid. Not till then, if at all, are the appellants liable to pay income tax in respect of the sewer.

(1) [1896] 2 Q. B. 205, at p. 211.
(2) (1880) 14 Ch. D. 785.
(3) [1896] A. C. 434.
(4) (1884) 13 Q. B. D. 9.
(5) 27 Sc. L. R. 71.

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Sir R. B. Finlay, A.-G. (*Rowlatt* with him), for the respondent. The first question is as to whether this sewer is a hereditament within Sched. A. That question cannot be summarily disposed of by saying that, although a sewer occupies the site of the land which it displaces, the pipes of which it is composed are not land and therefore the whole structure is not a hereditament, for the same argument might be applied to every underground cellar or basement, which displace land equally with a sewer, but which clearly are hereditaments. Both on principle and authority the case is irresistible for holding that this sewer is a hereditament.

In *Taylor* v. *Oldham Corporation* (1) it was laid down by Jessel M.R. in clear and explicit terms that when the Legislature says that a sewer shall be vested in a local authority the effect is to confer, not merely an easement, but an absolute right of property in so much of the sub-soil as is occupied by the sewer. That case is still good law, and nothing that was said in *Rolls* v. *Vestry of St. George the Martyr, Southwark* (2), in any way detracts from what was there said by Jessel M.R. The Court in *Rolls' Case* (2) merely pointed out that the result of property being vested in a public body for a particular purpose was that when the purpose ceases, the property ceases also. *Holywell Union* v. *Halkyn Drainage Co.* (3) supports the view expressed by Jessel M.R. in *Taylor* v. *Oldham Corporation*. (1) The dictum of Lord Russell of Killowen C.J. in *Bradford* v. *Eastbourne Corporation* (4) is not good law if it is to be taken to mean that a local authority acquires only an easement by the vesting of a sewer. *Tunbridge Wells Corporation* v. *Baird* (5) does not touch the point in dispute here, for the only question there was whether a local authority, in whom a street was vested, thereby became the owners of the sub-soil. In *Metropolitan Ry. Co.* v. *Fowler* (6) it was held that a railway tunnel was a hereditament for the purpose of the Land Tax Act, 1797, and the principle of that decision is absolutely in point here. [He also referred to *Wandsworth Board of Works* v. *United Telephone Co.* (7) and *Westminster Corporation*

(1) (1876) 4 Ch. D. 395, at p. 411.
(2) 14 Ch. D. 785.
(3) [1895] A. C. 117.
(4) [1896] 2 Q. B. 205, at p. 211.
(5) [1896] A. C. 434.
(6) [1893] A. C. 416.
(7) (1884) 13 Q. B. D. 904.

v. *Johnson*. (1)] It does not follow that if a sewer is assessable to income tax a street must also be so, because no substratum of a street is vested in the local authority.

Secondly, the sewer is not assessable under Rule No. 3. All the properties dealt with in that rule are properties used for undertakings of a mercantile character, and a sewer owned by a local authority bears no sort of resemblance to any of them. The only point decided in *Paddington Burial Board* v. *Inland Revenue Commissioners* (2) was that the fact that the profits of a cemetery had to be devoted to a public purpose did not prevent them from being chargeable. The cemetery in *Edinburgh Southern Cemetery Co.* v. *Solicitor of Inland Revenue* (3) was clearly a commercial undertaking. The position of the appellants with regard to this sewerage undertaking is analogous to that of a corporation which supplies gas for public purposes, which was held in *Dillon* v. *Haverfordwest Corporation* (4) not to constitute the carrying on of a trade. [He also referred to *Dublin Corporation* v. *M'Adam*. (5)]

Evans, K.C., in reply, referred to *Miller* v. *Glasgow Corporation Water Commissioners*. (6)

Sir R. B. Finlay, A.-G., replied.

Cur. adv. vult.

Dec. 20. WALTON J. read the following judgment:—The first and main question in this case is whether the appellants are chargeable under the Income Tax Act, Sched. A, Rule No. 1, in respect of the annual value of their sewer in the parish of Rumney. The appellants are the governing body of a united drainage district consisting of the urban district of Rhondda (formerly known as Ystradyfodwg) and the urban district of Pontypridd, constituted by virtue of a Provisional Order of the Local Government Board dated June 4, 1885, and duly confirmed by the Local Government Board's Provisional Orders Confirmation (No. 7) Act, 1885, for the purposes of carrying into effect a system of sewerage for the use of those urban districts, and it was provided by art. 19 of

(1) [1904] 2 K. B. 737.
(2) 13 Q. B. D. 9.
(3) 27 Sc. L. R. 71.
(4) [1891] 1 Q. B. 575.
(5) (1887) 20 L. R. Ir. 497.
(6) (1886) 23 Sc. L. R. 285.

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the said Order that all sewers made by the appellants should vest in and be under the control of the appellants. Pursuant to the powers vested in them by the said Order the appellants designed and constructed, and have since always maintained, a sewer or sewage carrier for the use of the said district, and have erected, maintained, and worked such works, machinery, and plant as were required for conveying the sewage of the said district to the sea. The total length of the said sewer or sewage carrier is about seventeen and a quarter miles, whereof nearly two and a half miles passes through or over land situate in the said parish of Rumney, which land (excepting such part as forms part of the foreshore of the Bristol Channel) was previously to the construction of the said sewer or sewage carrier, and still is, rated and assessed for the relief of the poor. The construction of the sewer or sewage carrier within the parish of Rumney is as follows: 182 yards of iron pipes carried on concrete arches above the surface of the ground; 1021 yards of pipes laid below the surface and ordinary level of the ground; 1890 yards carried below the surface of the ground, but covered by an artificial embankment of varying height, which rises above the level of the adjacent land; and 1246 yards of pipes (hereinafter called the outfall) passing partly over and partly beneath the surface of the foreshore of the Bristol Channel. Under the Local Government Board's Provisional Orders Confirmation (No. 8) Act, 1896, the appellants obtained powers enabling them with the consent of the Local Government Board to allow the sewers of the council of any county borough or district to communicate with the said sewer or sewage carrier vested in the appellants. In pursuance of these powers, and with the consent of the Local Government Board, agreements had, previously to the date of the making of the assessment now appealed against, been made with the Dinas Powis Urban District Council and the Caerphilly Urban District Council and the Cardiff Corporation whereby sewage of certain parts of the districts under the control of the said local bodies was to be received in, and carried away by, the said sewer or sewage carrier of the appellants upon payment to the appellants by the said local bodies of certain sums levied upon the respective rateable values of the said districts.

The assessment in question is for the year ending April 5, 1905, and the amount of the assessment is 800*l.* Although during the year in question the appellants received, in addition to what was levied in rates in their own district, sums amounting to 943*l.* 19*s.* 7*d.* from the Cardiff Corporation and the three urban district councils which made use of the sewer under the Order of 1896, it seems clear, and was not disputed, that they derived no profit from the use or working of their sewer or of that part of it which is in the parish of Rumney. The appellants appealed against the assessment to the Commissioners for the general purposes of the Income Tax Acts for the district of Monmouth, who confirmed the assessment subject to the case upon which I have now to pronounce the opinion of the Court, and the question which thus arises is of very general importance, and, so far as I know, entirely new.

I believe I am right in saying that this is the first time that the question has been raised, and perhaps the first time that a local authority has been assessed under the Income Tax Acts in respect of their interest in their sewers. However this may be, there seems to be, at all events, no direct authority upon the question. It is not contended by the appellants that a public authority such as a sewerage board is exempt from liability for income tax, or for income tax in respect of property used for public purposes. I have not to deal with any broad questions of policy. I have only to say whether, having regard to the language of the Acts, the assessment in question ought to be confirmed. The appellants contend, in the first place, that their interest in the sewer is an easement only, and as such is not a "hereditament capable of actual occupation" within Sched. A, Rule No. 1. The rule is as follows. [His Lordship read the rule, and continued :—] The sewer in this case is vested in the appellants under art. 19 of the Order of 1885. But it is admitted that their interest in the sewer is precisely similar to the interest which is vested in a local authority in the sewers within its district under s. 13 of the Public Health Act. And this again is similar to the interests in "streets" vested in the local authority under the same Act. I mention this because the numerous cases cited during the argument related mostly to

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streets or sewers vested in the local authorities under the Public Health Act. These authorities are, I think, applicable to the present case. Since the case of *Taylor* v. *Oldham Corporation* (1), which was decided in 1876, many questions have arisen as to the extent and duration of the estate vested in local authorities in their sewers or streets under the Public Health Act. But, subject to the later decisions upon these questions as to the extent in space and time of the estate of the local authorities, I think that what was said by Sir George Jessel in that case is a correct statement of the law. The passage to which I refer is as follows (2): "It was found under the old law, and it was sometimes held, that the sewer authorities had only an easement, and it was found to be very inconvenient, and consequently in the modern Acts the property in the sewers has been vested in the sewer authorities. That is to say, that instead of allowing the sub-soil to remain in the owner of the soil, subject to an easement or right of sewerage or drainage, the absolute property in the sewer (which means not merely in the brick barrel, or whatever it may be, forming the sewer, but the whole interior of the sewer, that is, the whole of the space occupied by it) is now vested in the sewer authorities." Mr. Evans, for the appellants, contended that the later authorities are not consistent with this statement of the law. And I have carefully considered the cases to which he referred me. The authority which appeared to go the furthest in support of his contention was a passage from the judgment of Lord Russell of Killowen in *Bradford* v. *Eastbourne Corporation*. (3) There the Lord Chief Justice had to consider the question as to whether a drain which connected two or more houses with a public sewer, and existed before the Public Health Act, 1890, came into operation, was a "private drain" within the meaning of s. 19 of the Act. And he was dealing with the argument that as the drain in question was a sewer within the meaning of s. 13 of the Public Health Act, 1875, and had vested in the local authority under that section, it could not be a "private drain" under s. 19 of the Act of 1890. In dealing with this argument Lord Russell had to consider the effect of s. 13 of the Act of 1875 and the decisions

(1) 4 Ch. D. 395.

(2) 4 Ch. D. at p. 411.

(3) [1896] 2 Q. B. 205.

upon the section, and in doing so he used the language which is relied upon by Mr. Evans. The passage is as follows (1): "But what is the meaning of the word 'vest' in s. 13 of the Act of 1875? It has been clearly held that the vesting is not a giving of the property in the sewer and in the soil surrounding it to the local authority, but giving such ownership and such rights only as are necessary for the purpose of carrying out the duties of a local authority with regard to the subject-matter." In this passage Lord Russell was not dealing with the question whether the interest of the local authority in a sewer is a mere easement or a property in the land. He was referring to the cases which have decided that the extent and duration of the property or estate acquired by the local authority are limited by reference to the purposes for which the property is vested in such authority. I do not think that the Lord Chief Justice intended to decide or to say that the interest acquired by the local authority was an easement only. In 1904 the case of *Westminster Corporation* v. *Johnson* (2) came before Wright J., and he accepted and acted upon the construction of Lord Russell's language which is relied upon by Mr. Evans. But his judgment was reversed by the Court of Appeal (3), where the present Master of the Rolls said as follows: "No doubt the tendency of modern decisions has been to limit the meaning of the word 'vest' in the Public Health Acts in connection with a street to vesting 'in the urban authority such property and such property only as is necessary for the control, protection, and maintenance of the street as a highway for public use,' as stated by Lord Herschell in the passage cited by Wright J. from *Tunbridge Wells Corporation* v. *Baird.* (4) But no case has gone so far as to hold that actual property, as distinguished from an easement only, was not passed to the authority by that word." It is true that the question in *Westminster Corporation* v. *Johnson* (2) arose, not under the Income Tax Act, but under the Land Tax Act, 1797, s. 4. The words in that section are—"all and every manors, messuages, lands, and tenements . . . . and all hereditaments of what nature or kind soever they be." The Court of Appeal held that the interest in

(1) [1896] 2 Q. B., at p. 211.
(2) [1904] 1 K. B. 19.
(3) [1904] 2 K. B. 737, at p. 744.
(4) [1896] A. C. 434.

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question was a hereditament within the meaning of the section. But the importance of the judgment of the Master of the Rolls for the purposes of the present case is in the expression of his opinion as to the meaning of the word "vest" in the Public Health Act in connection with streets and sewers, having regard to the language used by Lord Russell, which had been relied upon in the Court below by Wright J. As I have said, and as appears from these cases, the questions as to the vesting of streets and the vesting of sewers are, in principle, identical. In my opinion the interest of the appellants was not a mere easement, but was a property in the land and a "hereditament" which was "capable of actual occupation" (and, in fact, was occupied by the appellants) within the meaning of Sched. A, Rule No. 1. I ought perhaps to mention an argument in the nature of a reductio ad absurdum that if sewers fall within Rule No. 1, streets also must be chargeable. The answer to this is that streets are public highways, and unless the mines or subsoil under the highway are occupied or used for some profitable purpose, the land occupied by the highway is of no value to its owner or to anyone except the public.

But it is further contended for the appellants that even if their interest in the sewer is a "hereditament capable of actual occupation" it is within, and should be assessed under, Sched. A, Rule No. 3, and not under Rule No. 1. The material words of Rule No. 3, paragraph 3, are as follows. The rule begins: "The annual value of all the properties hereinafter described shall be understood to be the full amount for one year or the average amount for one year of the profits received therefrom within the respective times herein limited." The first paragraph is as to quarries, the second as to mines, and the third, which has been relied on, is in these words: "Of ironworks, gasworks, salt springs or works, alum mines or works, waterworks, streams of water, canals, inland navigations, docks, drains, and levels, fishings, rights of markets and fairs, tolls, railways and other ways, bridges, ferries, and other concerns of the like nature, from or arising out of any lands, tenements, hereditaments, or heritages, on the profits of the year preceding." It is said that the sewer comes under

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the general words of this rule "other concerns of a like nature"; that it is a concern of a nature like to that of a "stream of water," "dock, drain or level." But it must be remembered that to fall within this rule, it is not sufficient that the "concern" should be like one or other of the hereditaments expressly mentioned; it is not indeed sufficient, in my opinion, that the hereditament should be one of those expressly mentioned, as, for example, "a stream of water" or a "bridge." It is necessary, in order to bring the "concern" or hereditament within this rule, that it should be used for the purpose of a business by which profits are earned; although, of course, every hereditament used for the purpose of such a business is not within this rule. Some light upon the interpretation of the rule may be obtained from what was said in the case of the *Edinburgh Southern Cemetery Co.* v. *Solicitor of Inland Revenue* (1) by Lord Shand and by Lord M'Laren. As Lord Macnaghten said, in *London County Council* v. *Attorney-General* (2), income tax is always a tax upon income, or, at all events, upon a profit or gain in the nature of income. In the case of land, whether it is occupied by its owner or let, the annual profit or gain in the nature of income arising from the land is, in most cases, fairly and conveniently measured by the rackrent at which the land could be let by the year; but in some cases where the land is used for the purposes of business and constitutes what may be described as the plant, or sometimes indeed the stock-in-trade, of the business, the actual thing sold or dealt in, rackrent is not a convenient measure of the profit or gain arising out of the land; and I think it will be found that it is cases of this kind which are described and regulated by Rule No. 3 of Sched. A. If the appellants were making any profit by allowing any local authorities to use their sewer the case might be different and other questions might arise. But in fact the appellants make no profit whatever. They receive certain comparatively small payments which go pro tanto to reduce the very much larger cost of the maintenance and working of the sewer. The case falls within the words of Sched. A, Rule No. 1. In my opinion, it is not taken out of the rule by

(1) 27 Sc. L. R. 71. (2) [1901] A. C. 26, at p. 35.

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the fact that some payment is made to the appellants by the other authorities who make use of the sewer.

There is another contention of the appellants with which I must deal. It is stated in the appellants' points for argument, "that if contrary to what the appellants contend they are chargeable under Sched. A in respect of the annual value of the land, then in the alternative they contend that such annual value for the year ended April 5, 1905, is to be ascertained by reference to the adjoining land, which is purely agricultural land, and the rackrent at which the same is worth to be let as agricultural land, and inasmuch as the acreage of the land covered by this assessment is one and a half acres or thereabouts, and the rackrent of the adjoining land does not exceed 2*l.* per acre, the assessment should be upon that basis; that the poor rate assessment upon the subject-matter claimed to be chargeable has no application to the appellants' undertaking" for the purposes of income tax. Upon the question of amount, it appears to me that the Commissioners were at liberty to take the poor rate assessment into consideration as evidence of the gross annual value. They were not, and, as I understand their findings, did not, consider themselves bound by it. On the other hand, I do not think that they were bound to ascertain the annual value by reference to the rent at which the adjoining agricultural land is let. I do not think that the amount of the assessment has been ascertained upon any wrong principle. In my judgment, therefore, the assessment must be confirmed.

There will be judgment for the respondent with costs.

Judgment for respondent.

Solicitors for appellants: *Wrentmore & Son, for Morgan, Bruce & Nicholas, Pontypridd.*

Solicitor for respondent: *Solicitor of Inland Revenue.*

F. O. R.

JOHN HALL, JUNIOR & CO. *v.* RICKMAN.

1905
Dec. 8.

Revenue—Income Tax—Profits of Trade—Deduction for Depreciation of Plant by Wear and Tear—Customs and Inland Revenue Act, 1878 (41 & 42 *Vict.* *c.* 15), *s.* 12.

By s. 12 of the Customs and Inland Revenue Act, 1878, Income Tax Commissioners, in assessing trade profits or gains, are to allow "such deduction as they may think just and reasonable as representing the diminished value by reason of wear and tear during the year of any machinery or plant used for the purpose of the concern and belonging to the person or company by whom the concern is carried on."

A firm of shipowners owned a fleet of vessels of the average age of thirty-one years. Prior to the year of assessment there had been allowed yearly from the gross profits assessed to Sched. D an amount by way of deduction for diminished value by reason of wear and tear, and sums amounting in the aggregate to 96 per cent. on the first or prime cost of the vessels (including such sums as had been expended upon them by way of addition or repairs other than ordinary annual repairs) had been allowed: the existing, or breaking-up, value of the vessels during the year of assessment was more than 4 per cent. of the first or prime cost. There was no agreement between the shipowners and the Commissioners that the allowance for depreciation should be calculated on the basis of its being an allowance which would at the end of a period of years, taking into account the breaking-up value of the vessels, replace the shipowners' capital, and that after that date no further allowance should be made:—

Held, that the Commissioners were bound under s. 12 to consider to what extent there had been a diminution of value by reason of wear and tear during the year of assessment and to decide what was a just and reasonable allowance to make in respect of such depreciation, and that they were not entitled to take into account the allowances made in previous years:

Held, also, that a hulk, which had formerly been a sailing-ship, but which had been dismantled and had had its rudder removed and was used as a floating warehouse for coal, was "plant" within the meaning of the section.

Case stated by Commissioners of Income Tax on appeal against two assessments to income tax for the years ending April 5, 1901, and April 5, 1902, respectively.

The appellants, a firm of shipowners, were the owners of a fleet of vessels, whose average age during the years of assessment

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was thirty-one years; also of a wooden hulk forty years old, used by them in a coal-bunkering business. The question which came before the Commissioners for consideration was what was a just and reasonable allowance to be made from the assessments as representing the diminished value by reason of wear and tear during the years of assessment of the ships and hulk comprised in the appellants' fleet. (1)

It was admitted that prior to the first year of assessment the appellants' firm had been allowed from their gross profits assessed to Sched. D an amount by way of deduction for diminished value by reason of wear and tear in respect of their vessels, other than one called the *Peninsula* (2), sums amounting in the aggregate to not less than 96 per cent. on their first or prime cost, including such sums as had been expended upon them by way of addition or repairs other than ordinary annual repairs; the latter had been from time to time allowed as an expense chargeable against profits. The Commissioners found as a fact that these allowances had been made, and also that the breaking-up

(1) By the Income Tax Act, 1842 (5 & 6 Vict. c. 35), s. 100, Sched. D, Case 1, Rule 3: "In estimating the balance of profits and gains chargeable under Schedule D, or for the purpose of assessing the duty thereon, no sum shall be set against or deducted from, or allowed to be set against or deducted from, such profits or gains, on account of any sum expended for repairs of premises occupied for the purpose of such trade, manufacture, adventure, or concern, nor for any sum expended for the supply or repairs or alterations of any implements, utensils, or articles employed for the purpose of such trade, manufacture, adventure, or concern, beyond the sum usually expended for such purposes according to an average of three years preceding the year in which such assessment shall be made. . . . ."

By the Customs and Inland Revenue Act, 1878 (41 & 42 Vict. c. 15), s. 12: "Notwithstanding any provision to the contrary contained in any Act relating to income tax, the Commissioners for general or special purposes shall, in assessing the profits or gains of any trade, manufacture, adventure, or concern in the nature of trade, chargeable under Schedule D, or the profits of any concern chargeable by reference to the rules of that schedule, allow such deduction as they may think just and reasonable as representing the diminished value by reason of wear and tear during the year of any machinery or plant used for the purposes of the concern, and belonging to the person or company by whom the concern is carried on."

(2) As regards this vessel special facts, contentions, and findings were stated in the case, but it was not the subject of appeal, the decision of the Commissioners having been in favour of the appellants.

value of the ships in 1901 was considerably more than 4 per cent. of the first or prime cost together with the additions and repairs referred to.

The hulk was formerly a sailing-ship, but it had been dismantled and its rudder removed, and it was used as a floating warehouse for coal at Gibraltar; it was found as a fact that the total of the amounts allowed to the appellants in previous years in respect of her exceeded 100 per cent. of the first or prime cost together with expenditure by way of addition or repairs other than ordinary annual repairs.

The appellants claimed to be allowed in respect of all the ships and of the hulk such amount as fairly represented the diminished value by reason of wear and tear during the year of assessment of each of the ships and of the hulk, and contended that for the purpose of ascertaining the diminished value regard should be had only to the value at the year in question, and that a just and reasonable percentage upon that value should be allowed for depreciation, and that no regard should be had to the allowances made in previous years, and they referred to the terms of the Customs and Inland Revenue Act, 1878.

The respondent contended that as the appellants had received in the previous years an allowance for the diminution in value by reason of wear and tear of 96 per cent. of the prime cost (together with additions and repairs), and as the breaking-up value of the ships was more than 4 per cent. of their prime cost, the appellants were not entitled to any further allowance in respect of them. He further contended, on the same ground, that no allowance could properly be made in respect of the hulk, and also on the further ground that the hulk was a floating warehouse, and was not plant or machinery within the meaning of s. 12 of the Customs and Inland Revenue Act, 1878.

The Commissioners came to the conclusion that the allowance already made and received by the appellants was a sum which was just and reasonable, as sufficiently representing the diminished value by reason of wear and tear during the years of assessment, and they were further of opinion that no allowance could be made in respect of the hulk on the ground that it was a

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floating warehouse and was not plant or machinery within the meaning of the section.

The shipowners appealed.

Asquith, K.C. (*Maurice Hill* with him), for the appellants. The Commissioners misdirected themselves in holding that, as 96 per cent. of the original value of the vessels had been allowed in previous years, and their existing value exceeded 4 per cent. of the original value, they could not make an allowance in respect of wear and tear, which had undoubtedly taken place during the year of assessment. The language of s. 12 of the Act of 1878 that the Commissioners "shall" make such deduction as they think just and reasonable as representing the diminished value "by reason of wear and tear during the year" is perfectly plain; it can only mean that an allowance is to be made each year in respect of the wear and tear during that year, and the allowance cannot be refused on the ground that previous allowances may conceivably have been made on too liberal a scale. The only questions for the Commissioners are whether the plant will be diminished in value by wear and tear during the year of assessment, and what is a fair and reasonable amount to allow for the diminution in value.

Secondly, the hulk is "plant" within the meaning of s. 12; it comes within the definition of "plant" given by Lindley L.J. in *Yarmouth* v. *France* (1), as including, not stock in trade, but "all goods and chattels, fixed or movable, live or dead, which he keeps for permanent employment in his business." It is none the less "plant" because it is also a floating warehouse: *Carter* v. *Clarke*. (2)

[He also cited *Cunard Steamship Co.* v. *Coulson*. (3)]

Sir E. H. Carson, S.G. (*Rowlatt* with him), for the respondent. The duty of the Commissioners under s. 12 is merely to make such an allowance for wear and tear as is just and reasonable, and if such an allowance is to be made, they must determine the amount. It cannot be just and reasonable that the shipowners should have an allowance for wear and tear when the allowances already made, plus the existing value of their vessels, exceeds

(1) (1887) 19 Q. B. D. 647.
(2) (1898) 78 L. T. 76.
(3) [1899] 1 Q. B. 865.

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100 per cent. of their prime cost, so that the shipowners have been reimbursed in respect of their capital expenditure. It has been the practice, acquiesced in by the shipowners, to estimate the life of these ships at twenty-eight years, and an amount has been deducted each year proportionate to the assumed life of the ship, with the result that the outlay of the owners has been fully reimbursed. The deductions allowed by the section were intended to recoup the shipowners for payments out of capital which otherwise would not be the subject of an allowance or deduction. The vessels should now be considered as dead.

[He cited *Peninsular and Oriental Steam Navigation Co.* v. *Leslie* (1); *British India Steam Navigation Co.* v. *Leslie*. (2)]

Maurice Hill, in reply.

WALTON J. The question raised by this case is whether any allowance should be made to the appellants in respect of diminished value of their plant by reason of wear and tear during the two years of assessment, the plant consisting of certain vessels specified in the case. The claim for allowance is based on s. 12 of the Customs and Inland Revenue Act, 1878, which provides that "notwithstanding any provision to the contrary contained in any Act relating to income tax, the Commissioners for general or special purposes shall, in assessing the profits or gains of any trade, manufacture, adventure, or concern in the nature of trade, chargeable under Schedule D, or the profits of any concern chargeable by reference to the rules of that schedule, allow such deduction as they may think just and reasonable as representing the diminished value by reason of wear and tear during the year of any machinery or plant used for the purposes of the concern, and belonging to the person or company by whom the concern is carried on." The first year of assessment began on April 5, 1900, and that year and the following years are those in respect of which this question arises. The appellants were during those years the owners of, and used for the purposes of their business, the vessels in question. The Commissioners have decided (as set out in the special case) that the allowance already made and received by the appellants was

(1) (1900) 82 L. T. 137; 4 Tax Cas. 177.
(2) (1900) 4 Tax Cas. 257.

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a sum which was just and reasonable as sufficiently representing the diminished value by reason of wear and tear of the vessels of their fleet other than the steamship *Peninsula*, with regard to which I understand that no question now arises. The Commissioners have come to this conclusion because in the years before April 5, 1900, the appellants had certain allowances made to them for wear and tear, and therefore they were not entitled during the two years following that date (and as I understand the decision they never will for the future be entitled) to have any allowance made to them for wear and tear in respect of those particular vessels.

Now, the foundation for that decision is this. The Commissioners have during a period of years made allowances to the appellants in respect of the wear and tear of these vessels of sums which in the aggregate amounted to 96 per cent. of their prime cost, while the breaking-up value of the vessels amounts to more than 4 per cent. of that value, and therefore the appellants had received before April 5, 1900, allowances representing the full value of the vessels. It is contended that after that date the appellants could not suffer any further loss of capital by depreciation, because their capital had been restored to them by way of allowance of 96 per cent. of that value, and of their still being possessed of the breaking-up value of the vessels. The allowances were made upon the basis that what I may call the life of the vessels was represented by a period of twenty-eight years, and upon that assumption it is contended that from April 5, 1900, these vessels ought to be treated as if they were dead. The difficulty arises from the fact that they are not dead, but are still of considerable value, and are still being used and are still depreciating in value year by year.

The contention of the Commissioners seems to me not in itself an unreasonable one, assuming, of course, that during the whole of the period the vessels have been the property of the same owner, which seems to be the fact in the present case. I have not, however, to decide what, having regard to all the facts past and present, it would be fair to do; I have to give effect to the Act of Parliament. The case might be different if there were any evidence of an agreement between the appellants and the

Commissioners that the allowance for depreciation should be calculated upon the basis of its being an allowance which would at the end of a period of years, taking into account the breaking-up value of the vessels, fully replace the appellants' capital, and that after that date no further allowances should be made; but there is no evidence to that effect, and no such agreement is relied upon. I have therefore to determine what under the existing circumstances is the effect of s. 12 of the Customs and Inland Revenue Act, 1878. Now, it is not denied that during the two years in question the value of these vessels has diminished by reason of wear and tear, and, that being so, I think that the Commissioners must consider to what extent there has been such a diminution of value, and what would be a just and reasonable allowance to make in respect of that depreciation, and I do not think that they are entitled to take into account the allowances that have been made in previous years. Those allowances may have been too large or too small, but that consideration cannot affect the question as to what is a just and reasonable allowance for the years in question. It seems plain that if the vessels had been sold and had been the property of some one other than the appellants during the years in question, and had been used by those other owners for the purposes of their business, the Commissioners would have been obliged to make up their minds as to what was a just and reasonable allowance. Apart from agreement (as to which there is no question), I think it can make no difference that the vessels continue to be the property of, and to be used by, the same owners; all that the Commissioners have to deal with is the amount of depreciation during the years in question, and they must consider what is a fair and reasonable allowance; of that question they are the sole judges, and it is not for me to decide. As to the hulk, I think it is clearly plant —indeed, the Solicitor-General has not argued to the contrary. The appeal must therefore be allowed.

Appeal allowed.

Solicitors for the appellants: *Cattarns & Co.*

Solicitor for the respondent: *Solicitor of Inland Revenue.*

W. J. B.

1905
Dec. 7, 18.

SPEYER BROTHERS *v.* COMMISSIONERS OF INLAND REVENUE.

Revenue—Stamp—Treasury Note of Foreign Government—Promissory Note—Marketable Security—Debenture—Stamp Act, 1891 (54 & 55 *Vict. c.* 39), *ss.* 33, 82, 122.

A foreign Government issued a series of instruments, described as "gold coupon treasury notes," each of which contained a promise to pay the amount of the note in gold to the bearer at a certain date two years from the date of issue; attached to each note were coupons for the payment of the interest in gold, the interest being payable abroad, but at the option of the bearer in London. The notes were redeemable at par at any time before maturity at the option of the issuing Government upon their giving sixty days' notice of their intention to redeem; they gave no security to the holder beyond the promise to pay the face amount of the note; and they were marketable, though not readily saleable, on the London Stock Exchange:—

Held, that the instruments were promissory notes within the meaning of s. 33 of the Stamp Act, 1891, and were sufficiently stamped as such; and that they were not marketable securities within the meaning of s. 122, sub-s. 1, nor debentures within the heading "mortgage, bond, debenture, covenant," in Sched. I. of that Act.

Case stated by Commissioners of Inland Revenue under s. 13 of the Stamp Act, 1891 (54 & 55 Vict. c. 39).

The instrument upon which the question arose was described upon its face as a "four-and-a-half per cent. Gold Coupon Treasury Note," was dated June 1, 1903, and was issued by the Government of the United States of Mexico in pursuance of a law congress of May 15, 1903. The material parts of the document are as follows:—"United States of Mexico acknowledge themselves indebted and promise to pay to bearer on the 1st day of June, 1905, one thousand dollars in gold coin of the United States of America, and also to pay interest on said principal sum in like gold coin at the rate of four and one-half per cent. per annum from the 1st day of June, 1903, semi-annually on the 1st days of December and June in each year upon surrender of the annexed coupons as they respectively mature. Both as to principal and interest this treasury note shall be for ever exempt from any taxes or assessments which may at present exist or be

hereafter imposed by the United States of Mexico. The principal and interest of this treasury note are payable in the City of New York at the office of Speyer & Co. or at the option of the holder in London, England, at the office of Speyer Brothers, in sterling at the fixed rate of $4.85 to the pound sterling."

The note was also stated to be redeemable at par and accrued interest at the option of the United States of Mexico at any time before maturity on sixty days' notice, to be given in certain newspapers in New York and London.

The coupons attached to the note provided that "on the 1st day of 19 , unless the above-mentioned treasury note shall be sooner redeemed, and on surrender of this coupon, United States of Mexico will pay to bearer in the City of New York, U.S.A., at the office of Speyer & Co., twenty-two dollars and fifty cents. in gold coin of the United States of America, or in London at the office of Speyer Brothers 4*l.* 12*s.* 9*d.* sterling, being six months' interest then due on said treasury note."

The instrument was one of a series numbered consecutively. There was no evidence where it was issued, but it was to be taken as having been negotiated here.

It was shewn to the satisfaction of the Commissioners that certain of the instruments forming part of the series, and similar to the one in question, were offered on the Stock Exchange to a firm of dealers who were members of the Stock Exchange, and an agreement for sale thereof to them was effected; but the contract was never completed because the instruments were not stamped with the duty now claimed, and the transaction was rescinded by mutual consent. It was also proved that a dealer effected a purchase of the instruments, which he bought for himself as a personal investment and not for resale. It was also shewn that instruments whereby foreign States contract to pay sums of money to the bearer at a date not exceeding two years from the time of execution were habitually offered for sale and purchase on the London Stock Exchange, although such securities were not quoted in the official quotations of the Stock Exchange.

Upon the facts above stated the Commissioners found as a fact that the instrument in question was capable of being sold on the London Stock Exchange and on other stock markets in the

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United Kingdom. Upon this question the Court was to be at liberty to direct that evidence be taken.

The Commissioners, being further of opinion that the instrument, if not a marketable security, would have fallen to be charged under the head "debenture" in Sched. I. to the Stamp Act, 1891, and that it was a marketable security by a foreign State or Government within the meaning of s. 82, sub-s. 1 (*b*), of that Act, assessed it by reference to the head "marketable security" (sub-head 3) in Sched. I. of that Act, with 1*l.* 1*s.*, being at the rate of 1*s.* for every 10*l.* of the money thereby secured at the rate of exchange therein contracted to be paid. The appellants contended that the instrument was liable to duty (if at all) only by reference to the heading "promissory note" in the First Schedule to the Stamp Act, 1891, and in any case was not liable as a "debenture" or a marketable security, and, being dissatisfied with the assessment, required a case to be stated.

The questions for the opinion of the Court were—(1.) Whether the instrument was liable to the duty assessed; (2.) if not, to what, if any, duty it was liable.

Upon the argument of the special case evidence was called upon the question whether the instrument was of such a description as to be capable of being dealt in according to the ordinary practice of the Stock Exchange, and Walton J. found that, although such instruments were not easily saleable, being redeemable at sixty days' notice, and there was not a ready market for them, they were capable of being so sold, and were marketable.

Danckwerts, K.C. (*Vaughan Hawkins* with him), for the appellants. The Commissioners were wrong in holding this instrument to be a "marketable security" within the meaning of s. 82, sub-s. 1 (*b*), of the Stamp Act, 1891. It is sufficiently stamped, if stamped as a promissory note. It contains a promise to pay a sum of money, and is therefore clearly a promissory note within s. 33 of the Act of 1891. It is described on its face as a treasury "note," and it gives no security for the amount of the loan which it promises to repay; it is therefore nothing more than a promissory note. There is nothing on the face of the

instrument to alter its character of a promissory note, and this distinguishes the case upon the facts from *Brown, Shipley & Co.* v. *Inland Revenue Commissioners* (1), where a certificate stamped on its face to the effect that the note was secured by a deposit of securities was held to make the instrument a security for the money lent upon it, and therefore liable to be stamped as a marketable security. Further, it is not a debenture, a term which is in practice confined to certain securities issued by joint stock companies, and which seems inapplicable where the document is issued by a foreign Government; and it does not fall within the decision in *British India Steam Navigation Co.* v. *Inland Revenue Commissioners* (2), where the document was described on the face of it as a debenture. It is not a marketable security within the meaning of s. 82 or s. 122 of the Stamp Act, 1891, for the interest is not payable in the United Kingdom, as required by s. 82, sub-s. 1 (*b*) (iii.).

Sir R. B. Finlay, A.-G. (*Rowlatt* with him), for the respondents. The decision of the Commissioners was right. The instrument is not a promissory note. Promissory notes are not issued by foreign Governments, and the addition of a sheet of interest coupons is a feature wholly inconsistent with the idea of a promissory note.

[WALTON J. No doubt it is not a promissory note in the ordinary commercial sense; but may it not be one within the meaning of s. 33 of the Stamp Act, 1891? The case of *Rothschild* v. *Inland Revenue Commissioners* (3) shews that a document which is not in ordinary parlance a bill of exchange may be one for the purposes of the Stamp Act.]

Even assuming that it is capable of being construed as a promissory note within the meaning of s. 33, the mere fact that the instrument falls under that head does not prevent its falling under another head which is applicable to it, and in that event it is chargeable with duty at the highest rate: *British India Steam Navigation Co.* v. *Inland Revenue Commissioners* (2): *Brown, Shipley & Co.* v. *Inland Revenue Commissioners*. (4) This

(1) [1895] 2 Q. B. 598.
(2) (1881) 7 Q. B. D. 165.
(3) [1894] 2 Q. B. 142.
(4) [1895] 2 Q. B. 598; and see Highmore's Stamp Laws, p. 9.

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instrument has already been held to be marketable; it is also a security, and is a marketable security within the definition in s. 122, sub-s. 1, of the Stamp Act, 1891; on this point the decision in *National Telephone Co.* v. *Inland Revenue Commissioners* (1) is a clear authority. In that case A. L. Smith L.J. pointed out that the question was not what in ordinary parlance could be called a security, but what was the meaning of the word "security" in the taxing Act, and he further said that the word, as there used, "clearly includes an instrument by which the obligation to pay is originally created." In the present case the interest is payable in the United Kingdom within the meaning of s. 82, sub-s. 1 (*b*) (iii.), because by the coupon the bearer is entitled to demand payment in London; the instrument is therefore taxable as a marketable security under that section. Alternatively, the instrument is a debenture, and is taxable under the head, "mortgage, bond, debenture, covenant" in Sched. I. to the Act of 1891; for "you may have a debenture which is nothing more than an acknowledgment of indebtedness": *per* Lindley J. in *British India Steam Navigation Co.* v. *Inland Revenue Commissioners.* (2)

Danckwerts, K.C., in reply, referred to *Yates* v. *Evans* (3): *Preussing* v. *Ing* (4); *Wills* v. *Noott* (5); *Mortgage Insurance Corporation* v. *Inland Revenue Commissioners.* (6)

Cur. adv. vult.

Dec. 21. The following written judgment was delivered by

WALTON J. The question in this case is whether a certain instrument is chargeable with any, and what, stamp duty. The instrument is in the following terms. [The learned judge read the document, and continued: —] The appellants contend that this instrument is taxable (if at all) only as a promissory note. The respondents, the Commissioners of Inland Revenue, contend—(1.) that the instrument is not a promissory note within the meaning of the Stamp Act, 1891; (2.) that it is chargeable

(1) [1899] 1 Q. B. 250, at pp. 257, 258.
(2) 7 Q. B. D. 165, at p. 173.
(3) (1892) 66 L. T. 532.
(4) (1821) 4 B. & A. 201.
(5) (1834) 4 Tyrw. 726.
(6) (1888) 21 Q. B. D. 352.

either as a marketable security, or, in the alternative, as a debenture within the meaning of the schedule of the Act of 1891. The respondents further contend by their points that, if the instrument is either a marketable security or a debenture within the meaning of the Act, it is immaterial whether it is or is not also a promissory note. Evidence was given before me as to whether the instrument in question was of such a description as to be capable of being sold on the Stock Exchange. I found as a fact that it was. Upon this the appellants contended that if the instrument is a promissory note within s. 33 of the Stamp Act, 1891, it is chargeable as a promissory note even though it is capable of being sold on the Stock Exchange. For the respondents it was admitted that, upon the authorities as they now stand, and are binding upon a judge of first instance, if the instrument in question is a promissory note, and not a debenture, it is not chargeable as a marketable security. This appears to me to be the effect of the judgment of the Divisional Court in *Brown, Shipley & Co.* v. *Inland Revenue Commissioners* (1); and although this judgment was reversed upon the question whether the instrument there in question was a promissory note and nothing more, the Court of Appeal did not question, and, indeed, proceeded upon the assumption that, if the instrument had been a promissory note and nothing more, it would not have been chargeable as a marketable security merely because it was capable of being dealt in on the Stock Exchange. The question, therefore, which I have to decide is whether the instrument now in question is a promissory note, and, for the purposes of the Stamp Act, 1891, nothing more than a promissory note.

The meaning of the expression promissory note is defined by s. 33 of the Stamp Act, 1891, which is in these words:— "(1.) For the purposes of this Act the expression 'promissory note' includes any document or writing (except a bank-note) containing a promise to pay any sum of money. (2.) A note promising the payment of any sum of money out of any particular fund which may or may not be available, or upon any condition or contingency which may or may not be performed or

(1) [1895] 2 Q. B. 240.

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happen, is to be deemed a promissory note for that sum of money." It is obvious that this definition is intentionally made very wide. It is quite plain (especially having regard to sub-s. 2 of s. 33) that it makes chargeable as promissory notes instruments which would not be promissory notes within the Bills of Exchange Act, or in the sense in which the expression is ordinarily understood by men of business. I think that it is impossible to deny that the instrument in question is a document containing a promise to pay a sum of money. It is therefore, in my opinion, a promissory note within the interpretation contained in s. 33.

This, however, is by no means conclusive of the questions raised by the case. A mortgage ordinarily contains a promise to pay a sum of money. The same is true of a bond. But it is clear that such a mortgage or bond would not be sufficiently stamped, if stamped as a promissory note. They are mortgages or bonds even though they come within the definition of promissory note in s. 33, and if they are marketable they are chargeable as marketable securities. It was not contended that the instrument in question is a bond or mortgage. In the case of *Brown, Shipley & Co.* v. *Inland Revenue Commissioners* (1) it was held that the holder of the instrument there in question took by the terms of it not merely a promise to pay, but also a security for payment in certain first mortgage gold bonds described in the instrument. It seems clear, however, that by the instrument in question in the present case the holder gets no security other than the promise to pay. This case, therefore, does not fall within the class of cases of which *Brown, Shipley & Co.* v. *Inland Revenue Commissioners* (1) is an example.

But it is further contended by the respondents that the instrument in question, even if it affords no security other than the promise to pay, is a "debenture" within the meaning of the schedule, and therefore being something more than a promise to pay, and being marketable, is chargeable as a marketable security. I think that if it is a debenture, being, as I have found it is, capable of being dealt in on the Stock Exchange, it is chargeable as a "marketable security." But is it a debenture? There is no

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definition of the word "debenture" in the Stamp Act. The respondents contend that the document is a debenture upon the authority of the case of *British India Steam Navigation Co.* v. *Inland Revenue Commissioners.* (1) The instrument in that case was a document issued by a company and described on the face of it as a "debenture." It contained a promise to pay, and did not give to the holder any security other than the promise to pay. It was held by Grove J. and Lindley J. that the instrument was a debenture. It seems to me clear that, although it was admitted that the fact that the instrument was on the face of it described as a debenture was not absolutely, or in itself, conclusive, that was the fact upon which the judgment mainly depended. This is stated in so many words by Grove J. in the last sentence of his judgment on p. 171; and Lindley J. agreed; and it may be that if a company issues an instrument and calls it a debenture, thereby obtaining and conferring the commercial advantages described by Lindley J. in his judgment on p. 173, the parties to the instrument cannot very well deny as against the Commissioners of Inland Revenue that it is a debenture. But, however that may be, I think that the fact that the instrument in question in that case was described on the face of it as a debenture was an essential ground of the decision. In the present case the instrument does not describe itself as a debenture. It is not an instrument issued by a company. It is a promise to pay by a sovereign state. Wide as the definition of a debenture may be, I can see no reasons for calling the instrument in question a debenture. It is a promise to pay a principal sum at a certain date, and interest meantime. Such a promise might be made by a document which would be a promissory note, not only within the Stamp Act, but also within the Bills of Exchange Act. I am not deciding that the document in question is a promissory note under the Bills of Exchange Act. The fact that the payment of interest is to be made upon the surrender of coupons annexed to the instrument appears to me to make no difference for the purposes of this case. I am unable to come to the conclusion that the instrument is a debenture. It seems to me to be a

(1) 7 Q. B. D. 165.

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promise to pay a sum of money—principal and interest—and nothing more. In my judgment the instrument is liable to be assessed as a promissory note. There will, therefore, be judgment for the appellants with costs.

Appeal allowed.

Solicitors for the appellants: *Bircham & Co.*

Solicitor for the respondents: *Solicitor of Inland Revenue.*

W. J. B.

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Dec. 11, 12.

THE KING *v.* SOMERS AND OTHERS.

Highway—Private Driftway—Conversion into Public Way—Persons whose Consent necessary to—Highway Act, 1862 (25 & 26 *Vict. c.* 61), *s.* 36.

Persons entitled to a right of passage, by way of easement or licence, over a driftway or other private road are not "occupiers" of the way within the meaning of s. 36 of the Highway Act, 1862, and their consent is not necessary to an application to justices for a declaration converting the way into a public highway.

RULE for a certiorari to justices of the county of Somerset.

By an award of commissioners under an Inclosure Act made in the year 1791, a private driftway in the parish of Bleadon was set out for the benefit of the owners and occupiers of certain inclosures. In 1836 the freehold of the driftway was acquired by the Bristol and Exeter Railway Company. In 1863 the Bristol and Exeter Railway Company granted under seal to a Henry Davies, his heirs and assigns, a right of passage along the driftway in common with all other persons from time to time entitled to the use of the way. The right so granted was not expressed to be appurtenant to any tenement, and was granted in consideration of a sum of 50*l.* paid, and of a covenant by the said Davies to maintain in perpetuity the way in good repair. Subsequently the undertaking of the Bristol and Exeter Railway Company was acquired by, and the freehold of the driftway became vested in, the Great Western Railway Company, and Davies' interest in the driftway became vested by assignment in

a company called the General Estates Company. In 1904 the inhabitants of the parish of Bleadon expressed their desire to undertake the repair and maintenance of the driftway in return for the use of it, and the Axbridge Rural District Council, within whose district the said parish is situate, at their request made an application to the justices under s. 36 of the Highway Act, 1862 (1), for the conversion of the driftway into a public carriage-way to be repaired by the parish. The consent in writing of the Great Western Railway Company as the owners of the soil of the way to the making of the application had been obtained, but no consent had been obtained from the General Estates Company. Objection was taken before the justices on behalf of the General Estates Company that their consent was necessary, but the justices overruled the objection and made the order.

A rule having been obtained to bring up the order to be quashed,

Macmorran, K.C., and *Bonsey* shewed cause. Even assuming that the General Estates Company were entitled to the same right of passage that was granted to Davies, they were not "occupiers" of the way or of any part of it within the meaning of s. 36. The occupiers referred to in the section are the occupiers of the servient tenement over which the way passes. But the General Estates Company have not even a right of passage, for the interest of Davies was a mere licence in gross, and such a licence is not assignable: *Ackroyd* v. *Smith*. (2)

C. A. Russell, K.C., and *W. Mackenzie*, in support of the rule. Although the right of passage granted to Davies was not expressed

(1) By s. 36 of the Highway Act, 1862: "Where the inhabitants of any parish are desirous of undertaking the repair and maintenance of any driftway or any private carriage or occupation road within their parish in return for the use thereof, the district surveyor may, at the request of the inhabitants of such parish assembled in a vestry duly convened for the purpose, and with the consent in writing of the owner and the occupier of every part thereof, apply to the justices in petty sessions to declare such driftway or road to be a public highway to be repaired at the expense of the parish; and upon such application being made it shall be lawful for the justices to declare the same to be a public carriage road to be repaired at the expense of the parish."

(2) (1850) 10 C. B. 164.

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to be appurtenant to any tenement, there was in fact a contemporaneous grant by another deed of land in connection with which the right was intended to be enjoyed. It was therefore in substance a grant of an easement. Then if the assignment to the General Estates Company was good, they were "occupiers" of the way, and their consent was necessary. In *Manchester, Sheffield, and Lincolnshire Ry. Co.* v. *Wallis* (1) it was held that whilst cattle are passing along a highway the owners of such cattle are using it according to the dedication of the owner of the soil, and, being there with his consent, the owners are strictly occupying the highway. And this view of the law was accepted by the Court of Appeal in *Charman* v. *South Eastern Ry. Co.* (2) Those cases shew that a person lawfully using a public way may be an occupier of it. A fortiori will this be the case with a person lawfully using a private way. A private right of way cannot be extinguished, or merged in a public right of way, without either compensation or consent, and here there was no provision for compensation.

LORD ALVERSTONE C.J. The main question raised upon the argument of this rule turns upon the construction of s. 36 of the Highway Act, 1862, which provides that "where the inhabitants of any parish are desirous of undertaking the repair and maintenance of any driftway or any private carriage or occupation road within their parish in return for the use thereof, the district surveyor may, at the request of the inhabitants . . . . and with the consent in writing of the owner and occupier of every part thereof, apply to the justices in petty sessions," who may declare it to be a public carriage road to be repaired at the expense of the parish. It has been contended by Mr. Russell that persons enjoying private rights of passage along a driftway are occupiers within the meaning of that section, and that their consent must be obtained before an application can be made to the justices for its conversion into a public way, although they are not the occupiers of the soil over which the driftway passes In my opinion the persons whose interest it was intended to

(1) (1854) 14 C. B. 213. (2) (1888) 21 Q. B. D. 524.

protect, by requiring their consent before the application could be made, were the owners and occupiers of the land itself, upon whom an additional burden would be cast by the conversion of the way into a public road and the consequent increase in the number of persons who would have a right of passage along it. I think that persons who are entitled to mere easements or licences in respect of the way ought to have nothing to say in the matter. Their rights of way are not taken away or interfered with, and they lose nothing by the transfer to the parishioners of the duty of repairing the way. The cases of *Manchester, Sheffield, &c., Ry. Co.* v. *Wallis* (1) and *Charman* v. *South Eastern Ry. Co.* (2), which were relied upon by Mr. Russell, are no doubt authorities for the proposition that a man who is driving his cattle along a road may be regarded for some purposes as an occupier for the time being of the road within the meaning of s. 68 of the Railways Clauses Act, 1845 (8 & 9 Vict. c. 20), which enacts that a railway company shall, for the accommodation of the occupiers of lands adjoining the railway, maintain sufficient fences to prevent the cattle of the occupiers of the adjoining land from straying thereout on to the railway. But those cases are a long way from the present point, and cannot be regarded as authorities upon the construction of the word "occupiers" in this Act. For many purposes no doubt a person may be described as occupying a road when he is merely using it in the ordinary way; for instance, a cart which is delivering goods at a house may be said to be occupying the particular portion of the road on which it is standing at the moment. But such a use of the term affords us no assistance in construing the word "occupiers" in this section. A further objection was taken to the rule by Mr. Macmorran that the applicants here had not even any right of passage along the driftway, the right of passage which was granted to their predecessor in title by the railway company having been a mere licence in gross, and consequently not assignable. I do not in any way negative the contention that the grant to Davies was a licence and nothing more, but in view of our decision upon the construction of the section it is unnecessary to consider that point. I am of opinion that the justices were right in holding

(1) 14 C. B. 213. (2) 21 Q. B. D. 524.

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that all the parties whose consent was necessary to the application had been obtained. This rule must therefore be discharged.

LAWRANCE and RIDLEY JJ. concurred.

Solicitor for the General Estates Company: *G. M. Percy.*

Solicitors for the respondents: *Mead & Co., for F. Wood Wrington.*

J. F. C.

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Dec. 18, 19.

BROWN, APPELLANT *v.* LEGGETT, RESPONDENT.

Pharmacy Acts—Sale of Poisons—Pharmaceutical Society—Powers—Resolution—"Ought to be deemed a Poison"—Pharmacy Act, 1868 (31 & 32 *Vict. c.* 121), *ss.* 2, 17, *Sched. A.*

The appellant, a registered chemist, was convicted of selling veratrine, a poison, without having complied with the provisions of s. 17 of the Pharmacy Act, 1868, applicable to the sale of poisons within Part 1 of Sched. A to the Act. Veratrine is a poisonous vegetable alkaloid, and therefore a poison within Part 1 of Sched. A. The veratrine in question formed one of the ingredients of an ointment sold by the appellant for the destruction of vermin. In 1869 the Pharmaceutical Society in pursuance of s. 2 of the Act declared by resolution that every compound containing any poison within the meaning of the Act, when sold for the destruction of vermin, should be deemed a poison within the Act, but did not place these compounds in Part 1 of Sched. A:—

Held, that the Pharmaceutical Society has power to declare that a compound containing as one of its ingredients a poison mentioned in Part 1 of Sched. A ought to be deemed a poison within Part 2 of Sched. A; that the article sold by the appellant was a poison within Part 2 of Sched. A, and that the conviction was, therefore, wrong.

CASE stated by the stipendiary police magistrate for the city of Leeds.

An information was preferred on behalf of the respondent alleging that the appellant did unlawfully sell a certain poisonous vegetable alkaloid, being a poison named in the first part of Sched. A. to the Pharmacy Act, 1868, to wit, veratrine, to Margaret McCann, who was then a person unknown to him, the said Margaret McCann not being then introduced to him by

some person known to him, contrary to s. 17 of the Pharmacy Act, 1868. (1)

On the hearing of the information the following facts were proved or admitted :—

The appellant was a registered chemist and druggist carrying on business at a shop in Leeds, and was duly qualified. On July 27, 1904, the appellant at his shop sold to Margaret McCann a packet containing 228 grains of a substance known as "Rankin's ointment," to which was affixed a label distinctly and legibly printed in the words following: "Rankin's ointment for destroying vermin on the head. Trade mark 15,658. Tins 6*d.* and 1*s.* Poison. Not to be applied where the skin is broken. Price 6*d.*" Rankin's ointment is a compound prepared and sold for the destruction of vermin. Margaret McCann was a person then unknown to the appellant, and was not then introduced to him by any person known to him.

The packet of Rankin's ointment contained two and two-fifths grains (equivalent to rather more than 1 per cent. of the whole contents of the packet) of certain poisonous vegetable alkaloids. There was no evidence as to the ingredients used in the actual preparation of the ointment, but on analysis these poisonous vegetable alkaloids were found to consist to a very large extent (approximately 90 per cent.) of pure alkaloid

(1) The Pharmacy Act, 1868 (31 & 32 Vict. c. 121), s. 17: "It shall be unlawful to sell any poison, either by wholesale or by retail, unless the box, bottle, vessel, wrapper, or cover in which such poison is contained be distinctly labelled with the name of the article and the word 'poison,' and with the name and address of the seller of the poison; and it shall be unlawful to sell any poison of those which are in the first part of schedule (A) to this Act, or may hereafter be added thereto under section two of this Act, to any person unknown to the seller, unless introduced by some person known to the seller; and on every sale of any such article the seller shall, before delivery, make or cause to be made an entry in a book to be kept for that purpose stating, in the form set forth in schedule (F) to this Act, the date of the sale, the name and address of the purchaser, the name and quantity of the article sold, and the purpose for which it is stated by the purchaser to be required, to which entry the signature of the purchaser and of the person, if any, who introduced him shall be affixed; and any person selling poison otherwise than is herein provided shall, upon a summary conviction before two justices of the peace in England or the sheriff in Scotland, be liable to a penalty not exceeding . . . ."

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veratrine, which is a poisonous vegetable alkaloid. The quantity of pure alkaloid veratrine present would (if the ointment in the packet were taken internally by an adult human being) cause purging and vomiting, and possibly a fatal result.

Part 1 of Sched. A to the Pharmacy Act, 1868, comprises (inter alia) "strychnine and all poisonous vegetable alkaloids and their salts."

In pursuance of s. 2 of the Pharmacy Act, 1868 (1), the Council of the Pharmaceutical Society on December 1, 1869, declared by resolution that certain articles named in the resolution ought to be deemed poisons within the meaning of the Pharmacy Act. The resolution received the approval of the Privy Council, and the resolution and approval were advertised in the *London Gazette* of December 21, 1869.

The following is a copy of the resolution: "By virtue and in exercise of the powers vested in the Council of the Pharmaceutical Society of Great Britain, the said Council do hereby resolve and declare that each of the following articles, namely, preparations of prussic acid, of cyanide of potassium and of all metallic cyanides, of strychnine, of atropine, of corrosive sublimate, of morphine; red oxide of mercury (commonly known as red precipitate of mercury); ammoniated mercury (commonly known as white precipitate of mercury); every compound containing any poison within the meaning of the Pharmacy Act, 1868, when prepared or sold for the destruction of vermin; the tincture and all vesicating liquid preparations of cantharides, ought to

(1) Sect. 2: "The several articles named or described in the schedule (A) shall be deemed to be poisons within the meaning of this Act, and the Council of the Pharmaceutical Society of Great Britain (hereinafter referred to as the Pharmaceutical Society) may from time to time, by resolution, declare that any article in such resolution named ought to be deemed a poison within the meaning of this Act; and thereupon the said society shall submit the same for the approval of the Privy Council, and if such approval shall be given, then such resolution and approval shall be advertised in the *London Gazette*, and on the expiration of one month from such advertisement the article named in such resolution shall be deemed to be a poison within the meaning of this Act." [No specific reference to Part 2 of Sched. A occurs in the Act, but the effect of the exclusive references to Part 1 is that only the first operative clause of s. 17 applies to poisons in Part 2.]

be deemed a poison within the meaning of the Pharmacy Act, 1868; and also that of the same the following articles, viz., preparations of prussic acid, of cyanide of potassium and of all metallic cyanides, of strychnine, of atropine, ought to be deemed to be a poison in the first part of the Schedule A to the Pharmacy Act, 1868."

The magistrate was of opinion that vermin killers containing in dangerous quantities poisons within Part 1 of Sched. A fall within that part of the schedule. He accordingly convicted the appellant. The question for the opinion of the Court was whether upon the facts he came to a correct decision in point of law.

Sir E. Clarke, K.C. (*Bonsey* and *Glyn Jones* with him), for the appellant. The decision of the magistrate was wrong. By s. 2 of the Pharmacy Act, 1868, the Pharmaceutical Society was empowered to declare by resolution that any articles named in the resolution ought to be deemed poisons within the meaning of the Act. By the resolution of December 1, 1869, it was declared that certain articles including "every compound containing any poison within the meaning of the Pharmacy Act, 1868, when prepared or sold for the destruction of vermin" ought to be deemed poisons within the Act. The article in question comes within that description and it is therefore a poison within the Act; but vermin killers containing poison were not included in those poisons which by the resolution are placed in Part 1 of Sched. A, and therefore they come within Part 2, and as all the requirements of s. 17 with regard to the sale of poisons within Part 2. were complied with in this case, no offence was committed by the appellant.

Kerly, for the respondent. The penal provisions of the Pharmacy Act, 1868, are not confined to the sale of scheduled poisons in their simple state, but extend to the sale of a mixture or compound containing a scheduled poison: *Pharmaceutical Society* v. *Piper* (1); *Pharmaceutical Society* v. *Armson*. (2) The magistrate has found as a fact that this article contains in a dangerous quantity veratrine, which is a poisonous vegetable

(1) [1893] 1 Q. B. 686. (2) [1894] 2 Q. B. 720.

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alkaloid and is one of the poisons expressly included in Part 1 of the schedule. The article can therefore only be sold subject to the requirements of s. 17 as to the sale of poisons in Part 1 of Sched. A. The fact that the article contains only a small quantity of veratrine is immaterial. The same argument was urged unsuccessfully in the cases referred to. In *Armson's Case* (1) the article contained one-tenth of a grain of morphine, a preparation of opium which is a scheduled poison, and it was held that the article was consequently a scheduled poison. With regard to the argument based on the resolution of December 1, 1869, it is not necessary for the respondent to contend that the society has not power, when declaring an article to be a poison, to say within which part of the schedule it shall be included, provided that the particular article does not contain as an ingredient a poison within Part 1; but where an article, as in this case, does contain a Part 1 poison, then the cases cited are decisive that the article itself is a Part 1 poison, and the Pharmaceutical Society has no power to say that that article shall come within Part 2. In so far, therefore, as the resolution of December 1, 1869, purported to include in Part 2 vermin killers which contain Part 1 poisons, it is ultra vires. But the resolution does not in terms say that vermin killers are to be in Part 2, and it can, and ought to, be construed as meaning that vermin killers containing poisons in Part 1 fall within Part 1, while those which contain poisons in Part 2 fall within Part 2.

Sir E. Clarke, K.C., in reply. The resolution is not ultra vires. The power to declare that certain articles shall be deemed to be poisons necessarily involves the power to say whether a particular poison shall fall within Part 1 or Part 2 of the schedule, and this is recognized in s. 17, which refers to "any poison of those which are in the first part of Sched. A to this Act, or may hereafter be added thereto under s. 2." Further, in the Sale of Poisons (Ireland) Act, 1870, the provisions of which with regard to the sale of poisons are similar to those of the Act of 1868, there is to be found in Part 2 of Sched. A, "every compound containing any of the poisons mentioned in the schedule, when prepared or sold for the destruction of vermin,"

(1) [1894] 2 Q. B. 720.

from which it appears that the Legislature followed the terms of the resolution of the society which is now said to have been ultra vires. The cases cited are not in point, for they only decided that an article containing a scheduled poison is itself a poison. It is not disputed that the article in this case is a scheduled poison. The question is, does it come within Part 1 or Part 2? The society, by their resolution, have placed it in Part 2, and the Court cannot uphold the conviction except by overruling that resolution.

LORD ALVERSTONE C.J. In this case the argument has involved wider considerations than are really necessary for the decision of the question upon which the opinion of the Court is asked, and I do not question the correctness of the greater part of the argument of counsel for the respondent. If he is right in saying that we must regard this article as a poison within Part 1 of Sched. A, then it is clearly an offence to sell it without complying with the requirements of s. 17 as to poisons in Part 1; and I quite agree that the mere fact that a poison in Part 1 is mixed with some other ingredient does not render it any the less a poison within Part 1. For example, no one could contend that a person merely by mixing prussic acid with flour and describing it as a vermin killer could sell it without complying with the conditions imposed by s. 17 upon the sale of poisons in Part 1 of the schedule. Therefore it seems to me that the major proposition argued for the respondent does not touch the real point of the case. The question which we have to decide depends, in my opinion, upon whether the resolution of the Pharmaceutical Society dated December 1, 1869, is ultra vires; for by that resolution the society have declared that certain preparations, including "every compound containing any poison within the meaning of the Pharmacy Act, 1868, when prepared or sold for the destruction of vermin," shall be deemed to be poisons within the Act; and also that certain of those preparations, but not including vermin killers, shall be poisons within Part 1 of Sched. A. If the effect of that resolution is to prevent the article in question from being a poison within Part 1, then no offence has been committed in this

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case. The article is described as a vermin killer, but it contains as one of its ingredients pure alkaloid veratrine, which is a poisonous vegetable alkaloid; and in Part 1 of Sched. A there is to be found "strychnine and all poisonous vegetable alkaloids and their salts." It is contended on behalf of the respondent that the presence of the veratrine causes the article itself to become a poison within Part 1, and further, that the resolution of the society, in so far as it places in Part 2 of Sched. A vermin killers which contain poisons within Part 1, is ultra vires.

I was at first pressed with the view that under s. 2 the Pharmaceutical Society had power only to declare that certain articles shall be poisons within the Act, and had not power to say which part of Sched. A they should come within, but I have come to the conclusion that the scheme of the Act does involve giving to the society power to say whether a particular poison shall come within Part 1 or Part 2 of Sched. A. This view is supported by the language of s. 17, where it is dealing with poisons which are in Part 1 of Sched. A., for the section goes on to say "or may hereafter be added thereto under s. 2." Further, it is quite impossible to overlook the fact that Part 2 of Sched. A, in the Sale of Poisons (Ireland) Act, 1870, contains "every compound containing any of the poisons mentioned in this schedule," that is in either Part 1 or Part 2, "when prepared or sold for the destruction of vermin." That does seem to me to be tantamount to a recognition by the Legislature of the power of the Pharmaceutical Society to do what they had done by the resolution of 1869, namely, to put into Part 2 of the schedule compounds containing any poison when sold for the destruction of vermin.

There is no question here that the article is a poison within the Act and can only be sold in accordance with the provisions of the Act, but in my opinion the article is within Part 2 of Sched. A, and its sale is not governed by those provisions of s. 17 which apply to the sale of poisons within Part 1 of Sched. A.

For these reasons I am of opinion that the appeal should be allowed,

LAWRANCE J. I am of the same opinion.

RIDLEY J. I agree. The cases cited shew that a person is liable to be convicted for selling poisons contrary to the Act, although the article sold merely contains a scheduled poison as one of its ingredients. But the question which we have to decide in this case is whether the appellant was rightly convicted for selling this article without complying with the requirements of s. 17 as to the sale of poisons mentioned in Part 1 of Sched. A. The article in question is described as an ointment for destroying vermin, and in my opinion it comes within the words "every compound containing any poison within the meaning of the Pharmacy Act, 1868, when prepared or sold for the destruction of vermin," in the resolution of the Pharmaceutical Society. It is, therefore, a poison within the meaning of the Pharmacy Act, 1868.

I also think for the reasons given by my Lord that the society had power under s. 2 to declare by that resolution that certain articles should be placed in Part 1 of Sched. A. But as this article is not one of those placed in Part 1, it follows in my opinion that the decision of the learned magistrate was wrong.

Appeal allowed.

Solicitor for appellant: *Neve, Beck & Kirby.*
Solicitors for respondent: *Markby & Stewart.*

F. O. R.

1905
Dec. 15.

YOUNG *v.* JOINT BURIALS COMMITTEE FOR THE PARISHES OF KINGSTON-ON-THAMES, SURBITON, NEW MALDEN, AND COOMBE.

Burial Ground—Erection of Monuments—Fees—Burial Act, 1900 (63 & 64 *Vict. c.* 15), *s.* 3, *sub-s.* 4 (*i.*).

In 1893 a burial board acquired eight acres of land adjoining, but separated by a wall from, seventeen acres then being used as a burial ground, with the intention of using the eight acres also for burial purposes. In 1897 communication was made between the two areas and the eight acres were laid out as a burial ground, but no burials in fact took place there until after the passing of the Burial Act, 1900. The incumbent of a parish who was entitled to receive fees in respect of the erection of monuments on the seventeen acres claimed under s. 3, sub-s. 4 (i.) of the Burial Act, 1900, similar fees in respect of the eight acres:—

Held, that, although the eight acres formed part of the previously existing burial ground, the incumbent was not entitled to the fees claimed, because the eight acres had not been used as a burial ground before the passing of the Act.

Action tried by Channell J. without a jury.

The plaintiff's claim was for a declaration that as vicar of the parish of All Saints, Kingston-on-Thames, he was entitled in respect of the erection of monuments in any part of the defendants' burial ground to such fees as were payable to him as such vicar in respect of the erection of monuments in the said burial ground before the passing of the Burial Act, 1900, and that it was the duty of the defendants to collect such fees and pay them to the plaintiff.

The following statement of facts had been agreed upon by the parties:—

The plaintiff is the vicar of All Saints, Kingston-on-Thames. He was instituted and inducted into the vicarage in 1877.

At the time of the formation of the burial board hereinafter mentioned, the ecclesiastical parish of All Saints formed part of the then civil parish of Kingston-on-Thames, the residue of the area of such civil parish being then divided into several ecclesiastical parishes, which had at one time been included in the ecclesiastical parish of All Saints, Kingston-on-Thames, but

which had been separated therefrom under the provisions of the Church Building Acts and New Parishes Acts, and which from the time of such separations respectively had been separate and distinct ecclesiastical parishes.

There was at the time of the formation of the board a consecrated churchyard surrounding the parish church of All Saints, and a detached consecrated graveyard known as "The New Burial Ground," which was provided as an extension of the churchyard. The vicar of All Saints for the time being was entitled to receive, and did receive, before the formation of the board certain fees or sums in respect of burials and in respect of the erection of monuments, gravestones, and tablets, in the churchyard and extension, and also in respect of rights of burial in vaults in the churchyard and extension.

In 1854 a burial board was formed for the old civil parish of Kingston-on-Thames under the provisions of the Burial Acts then in force, and a site of about seventeen acres of ground was purchased by the board for the purpose of providing a burial ground for the parish. A portion of this site was laid out and enclosed by walls and railings, and was used for burials. This portion was divided into consecrated and unconsecrated parts in the manner sanctioned by the Home Secretary.

Shortly after this burial ground was acquired and appropriated for burials, the churchyard of All Saints and the extension were closed for burials by Orders in Council.

Under the provisions of s. 33 of the Burial Act, 1852, as extended by the Burial Act, 1853, the vicar of All Saints for the time being became entitled to receive certain fees or sums of money for burials and in respect of monuments, gravestones, and tablets erected in the consecrated part of the burial ground provided by the burial board, and also in respect of vaults and rights of burial in the consecrated part, in lieu of the fees or sums which he would have been entitled to on the grant of the like rights in the churchyard and extension. Such fees were always received by the burial board and paid over to the vicar of All Saints for the time being.

Between 1854 and 1893 additional portions of the seventeen acres acquired by the burial board were from time to time

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enclosed and added to the consecrated and unconsecrated parts of the burial ground in manner sanctioned by the Home Secretary, until the whole area of seventeen acres was included in the burial ground. The whole of the area of the seventeen acres was used or available for burials; the area was bounded on the south by a stream, on the east and west by brick walls erected by the burial board, and on the north by a road. No distinction was ever made between the various consecrated parts of the said seventeen acres as regards the right of the vicar of All Saints to receive the before-mentioned fees or sums, and as regards the receipt thereof by the burial board and the payment over thereof to him.

In 1893 the burial board purchased eight acres of land adjoining their burial ground of seventeen acres and put up a notice board stating thereon that the ground had been acquired for, and was intended to be used for, burial purposes. These eight acres adjoined the seventeen acres on the west side, but were separated from them by the western wall of the burial ground.

Under the provisions of the Local Government Act, 1894, the old civil parish of Kingston-on-Thames was divided into and became four civil parishes, namely, Kingston-on-Thames, Surbiton, New Malden, and Coombe, and all the property, powers, duties, and liabilities of the burial board were transferred to the defendants, and the two areas, consisting of seventeen acres and eight acres respectively, became by operation of law vested in the defendants.

In 1897 the wall forming the western boundary of the seventeen acres was lowered by the defendants to within one foot of the ground on the side of the seventeen acres, which was higher than the eight acres by about three feet, and communication between the old and new portions of the cemetery was effected by means of a flight of steps at one point for pedestrians and a slope for a carriage way at another point, and the defendants laid out and adapted the eight acres for burial purposes so that the area of eight acres might be used for burials when actually required. No portion of the eight acres was required or used for burials until November, 1902.

The additional area of eight acres was divided into consecrated and unconsecrated parts in manner sanctioned by the Home Secretary. Such sanction was given June 13, 1900. The consecrated part was consecrated on October 13, 1900.

The first burial in the area comprised in the eight acres in November, 1902, was in the consecrated portion.

The defendants from the time of the transfer to them of the property, powers, duties, and liabilities of the burial board up to the time of the passing of the Burial Act, 1900, have paid over to the vicar of All Saints for the time being the before-mentioned fees or sums in respect of the consecrated portions of the area of seventeen acres.

They also admit the right of the plaintiff, as such vicar, to continue to receive the like fees or sums since the passing of the Burial Act, 1900, in respect of monuments and other matters arising in the consecrated part of the seventeen acres, and to have such fees or sums collected by the defendants and paid over to him; and the defendants have continued to collect and to pay over such fees or sums to the plaintiff since the passing of that Act. But having regard to the provisions of s. 3, sub-s. 4, of that Act (1), they have retained in hand the before-mentioned

(1) Burial Act, 1900 (63 & 64 Vict. c. 15), s. 3, sub-s. 4: "Subject to the provisions of this section, no fee shall be payable to any incumbent of a parish in respect of any right of exclusive burial, or the erection of a monument, or any other matter whatsoever, in any burial ground maintained by a burial authority, except for services rendered by him, and this enactment shall apply to any such fee which is by law or custom payable to the churchwardens of any parish or to trustees or other persons for any parochial purpose, or for the discharge of any debt or liability, in like manner as it applies to fees payable to an incumbent.

"Provided as follows:—

"(1) Where at the passing of this Act, fees other than for services rendered are payable in respect of any matter arising in any burial ground attached to or used for the purposes of a parish, and laid out and used before the passing of this Act, the like fees shall continue to be paid during the incumbency of the person who, at the passing of this Act, is the incumbent of the parish, or during a period of fifteen years from the passing of this Act, whichever is longer, or if the fees are not paid to the incumbent, or to any person claiming through or under him, then during the said period of fifteen years, and shall be applicable to the like purposes as heretofore, and the burial authority shall collect and pay these fees in like manner as the fees to be paid for services rendered."

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fees for the erection of monuments, gravestones, and tablets in the said area of eight acres, pending a judicial decision as to whether or not such fees are by law payable to the plaintiff.

A. B. Kempe, for the plaintiff. The plaintiff's claim does not depend upon the question whether the eight acres were laid out and used as a burial ground before the passing of the Burial Act, 1900. The question is whether the eight acres are part of the original burial ground which, in the first instance, comprised the seventeen acres only or whether the eight acres constitute of themselves a separate burial ground. Sect. 25 of the Burial Act, 1852, imposes upon burial boards the duty of providing burial grounds. In performance of that duty the seventeen acres were acquired and laid out as a burial ground. Then when the additional accommodation was required there were two courses open to the board. Under s. 3 of the Burial Act, 1857, they might have provided another burial ground which would have been quite separate and distinct from the existing seventeen acres burial ground; or they might under s. 26 of the Act of 1852 have acquired land for making an addition to the existing ground. If the eight acres had been bought with the intention of forming a new and separate burial ground, it would have been the duty of the board under s. 34 of the Act of 1852 to affix in a conspicuous part of the ground a table of fees and payments in respect of interments on the eight acres. The omission to do this and the fact that communication has been made between the seventeen acres and the eight acres shew that the eight acres are not a separate burial ground, but are an addition to, and form part of, the existing burial ground; and it is, therefore, immaterial that no burials took place in the eight acres until after the passing of the Act of 1900. The seventeen acres and the eight acres together form one burial ground which was laid out and used before the Act of 1900, and the plaintiff is, therefore, entitled to the same fees in respect of the erection of monuments in the eight acres as he has always received for the seventeen acres. [He referred to *In re Ponsford and Newport District School Board.* (1)]

Lewis Thomas, for the defendants. The intention of s. 3

(1) [1894] 1 Ch. 454.

sub-s. 4 of the Burial Act, 1900, was that from the date of the passing of the Act all ministers of religion, whether members of the Church of England or of any other religious body, should be put upon the same footing with regard to burial fees, and that from that date the only payments should be for services rendered. Then the proviso to sub-s. 4 introduces a saving clause for the benefit of persons who were incumbents of parishes at the date of the Act which secured to them the right to the same fees as they had received before the Act. The plaintiff is seeking to turn that saving clause into an enacting clause, and to get under it something to which he was not entitled before the Act was passed. No fees were then payable to the plaintiff in respect of the eight acres, for at that time the ground had not been used as a burial ground. It had not even been consecrated. In respect of the eight acres the plaintiff cannot bring himself within the language of the proviso. The eight acres and the seventeen acres in fact constitute two separate burial grounds, and it is immaterial that there is internal communication between them.

Kempe replied.

CHANNELL J. The question raised by this case is one of some difficulty, because I suppose that facts exactly like these could not have been contemplated when the Act was drafted. The plaintiff's claim is, in form, for a declaration as to his rights to fees in respect of the erection of monuments in any part of the defendants' burial ground, but, in substance, and putting the question in a concrete form, what I have to decide is whether the plaintiff is entitled to a fee in respect of a monument erected in the consecrated portion of the eight acres of ground. It is agreed that unless the case comes within the first proviso to sub-s. 4 of s. 3 of the Burial Act, 1900, the plaintiff cannot succeed; and the question is, not whether the proviso gives the plaintiff a right to the fee, but whether it preserves it to him, for the obvious intention of the Act is to preserve for a limited time the vested rights of incumbents, and a test is laid down as to the state of things which must have existed previously to the passing of the Act in order that these vested rights may be preserved. Further, the rights intended to be preserved are, as it seems to

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me, rights which are vested in an incumbent in respect of a particular locality, namely a burial ground, formerly called a churchyard, and not in respect of his office as incumbent. The question which I have to determine is what land it is in respect of which it was intended to preserve these vested rights. The proviso to sub-s. 4 of s. 3 says: "Where, at the passing of this Act, fees other than for services rendered are payable in respect of any matter arising in any burial ground" (the monument in the consecrated part of the eight acres is clearly a matter arising in a burial ground) "attached to or used for the purposes of a parish and laid out and used before the passing of this Act." The latter words create the difficulty in this case. Can I say that a monument erected in the consecrated part of the eight acres is in a burial ground which was "used before the passing of this Act." The Act clearly does not mean that the identical spot where the person is buried or where the monument is erected must have been used before the passing of the Act, because it is not usual to bury two persons or to place two monuments in the same identical spot; but it seems to me that the words "laid out and used" must mean, "laid out and some part of which has been used," before the passing of the Act, though I do not know that that makes the section any easier to construe. Now, I have to consider whether the plaintiff had in this portion of the land any vested rights within the proviso to sub-s. 4. There is very great difficulty in holding that he had, because it would, as Mr. Kempe admits, follow from so holding that whenever, within fifteen years after the passing of the Act of 1900, an addition is made to an existing burial ground, the incumbent would be given fees in respect of that addition. I do not think that can have been intended. The words "and used" are introduced into the section, as it seems to me, for the express purpose of limiting the preservation of rights to rights on land actually taken into use, not merely intended to be used or purchased for the purpose of being used, but used in some substantial sense before the passing of the Act. I think that the eight acres were, in one sense, added to the burial ground, and I should say that, for most purposes as to which the question could arise, the eight acres are part of the original burial ground, but the intention of

the Act to limit fees to burial grounds already laid out and used would, I think, be entirely defeated, if one were to hold that whenever a piece of land is added to an existing burial ground the right to fees arises in respect of the added portion. The reason why I come to that conclusion is that I think that the fee which is intended to be preserved is a local fee, and that at the time when the Act was passed no vested right to fees had accrued in respect of the new piece of ground. It had not in fact been consecrated, though there had previously been the intention to consecrate it, and no burials had taken place in it. I think, therefore, that for the purposes of this section the eight acres must be treated as a separate burial ground from the seventeen acres. Otherwise, any future addition, within the fifteen years, to a previously existing burial ground would increase the area in respect of which the incumbent is to have his local fee, although it seems to me quite clear that there is an intention indicated in the Act of limiting the incumbent's rights to matters in which he had a vested interest at the time the Act was passed, If that had not been the intention the Act would have given the incumbent, for fifteen years, fees in respect of all the consecrated burial grounds attached to his parish. The limiting effect of the words, "laid out and used before the passing of this Act," cannot in my opinion be given effect to in the circumstances of this case except by treating the burial ground as consisting of two separate parts.

It is not without considerable doubt (and I am bound to say that throughout the greater portion of the argument I was of a contrary opinion) that I have come to the conclusion that my judgment must be for the defendants.

Judgment for defendants.

Solicitors for plaintiff: *Day & Son.*

Solicitors for defendants: *Durham, Carter & Durham.*

F. O. R.

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Jan. 16.

THE KING *v.* THE LONDON COUNTY COUNCIL. *Ex parte* NORRIS.

Local Government—Compensation—Transfer of Powers of London School Board to London County Council—Direct Pecuniary Loss—Officer of Authority whose Powers not transferred—Education Act, 1902 (2 *Edw.* 7, *c.* 42), *Sched. II., rr.* 16, 21—*Local Government Act*, 1888 (51 *& 52 Vict. c.* 41), *s.* 120.

Before the Education Act, 1902, came into operation in London the expenses of the London School Board were defrayed out of the consolidated rate, which was raised in the City of London by a precept directed to the Corporation of the City, and was collected for the Corporation by the applicant, who received a commission on the amount collected. When the Act came into operation the powers of the London School Board were transferred to the London County Council, and the education expenses were defrayed out of the poor-rate, which was collected by the overseers. The applicant, having thus lost a proportion of the commission he formerly earned, claimed compensation under r. 21 of Sched. II. of the Education Act, 1902, and s. 120 of the Local Government Act, 1888:—

Held, by Lord Alverstone C.J. and Ridley J. (Darling J. dissenting), that he was not entitled to compensation from the London County Council, since none of the powers or property of the Corporation of the City of London, whose officer he was, had been transferred to the County Council.

Rule calling on the London County Council to shew cause why a writ of mandamus should not issue to them commanding them to take into consideration and assess the just amount of compensation (if any) to be paid to one James Thomas Norris by reason of the diminution or loss of fees received by him as collector of the consolidated rates in the Ward of Tower in the City of London, consequent upon the transfer of the powers of the London School Board to the County Council.

It appeared that Norris was duly appointed by the Commissioners of Sewers for the City of London, who were the rating authority for the Corporation of the City of London under the Elementary Education Act, 1870, to collect the consolidated rate, out of which by that Act the expenses of the London School Board were to be paid, and that down to June 30, 1904, he had collected this rate and been paid by commission or poundage for

so doing. By the Education (London) Act, 1903 (3 Edw. 7, c. 24), the provisions of the Education Act, 1902 (2 Edw. 7, c. 42), were applied to London, with the result that the powers, rights, and liabilities of the London School Board were transferred to the London County Council, and the expenses of the County Council in this behalf became payable, not out of the consolidated rate as heretofore, but out of the county fund, and were collected with the poor-rate by the overseers of the different parishes. The effect of this was that Norris's commission on the amount collected by him was proportionately diminished, and he claimed to have suffered direct pecuniary loss and to be entitled to compensation under r. 21 of Sched. II. of the Education Act, 1902, and s. 120 of the Local Government Act, 1888. (1) The County Council declined to entertain his application, and he then obtained this rule for a mandamus.

Macmorran, K.C., and *W. C. Ryde*, for the County Council, shewed cause against the rule. Norris was not an officer transferred under the Education Act, 1902, nor was he an officer of any authority whose powers were transferred to the County Council. He was the officer of the Commissioners of Sewers or of the Corporation of the City of London, and not of the London School Board, and none of the powers of the Commissioners of Sewers or of the Corporation of the City of London were transferred to the London County Council. The only powers

(1) By the Education Act, 1902 (2 Edw. 7, c. 42), Sched. II., r. 21: "Section 120 of the Local Government Act, 1888, which relates to compensation to existing officers, shall apply as respects officers transferred under this Act, and also (with the necessary modifications) to any other officers, who, by virtue of this Act or anything done in pursuance or in consequence of this Act, suffer direct pecuniary loss by abolition of office or by diminution or loss of fees or salary in like manner as it applies to officers transferred under this Act."

By the Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 120: "Every existing officer declared by this Act to be entitled to compensation, and every other existing officer . . . . who, by virtue of this Act or anything done in pursuance of or in consequence of this Act, suffers any direct pecuniary loss by abolition of office, or by diminution or loss of fees or salary, shall be entitled to have compensation paid to him for such pecuniary loss by the county council, to whom the powers of the authority, whose officer he was, are transferred under this Act."

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transferred by the Education Act, 1902, and the Education (London) Act, 1903, to the London County Council were the powers of the London School Board. By s. 120 of the Local Government Act, 1888, the only authority by whom compensation is to be paid is "the county council, to whom the powers of the authority, whose officer he was, are transferred." The words in r. 21, "with the necessary modifications," cannot have been intended to do away with this qualification.

Cunningham Glen, in support of the rule. The second part of r. 21 of Sched. II. of the Education Act, 1902, can have no application if it does not apply to such a case as this. Rule 16 provides that "the officers of any authority whose property, rights or liabilities are transferred under this Act to any council shall be transferred to and become the officers of that council," so that the second part of r. 21 can only have reference to the officers of an authority whose powers have not been transferred to the county council. It is clear that Norris has suffered a direct pecuniary loss by the loss of the commission on so much of the rate as he was accustomed to collect for the purposes of education, and he is entitled to compensation from the County Council in respect of that direct pecuniary loss under r, 21.

DARLING J. In this case I have the misfortune not to have come to the same conclusion as the rest of the Court, and I therefore must express my opinion first.

The claim is a claim to compensation by virtue of the Education Act, 1902, and the Local Government Act, 1888, s. 120. The claim arises, as I understand it, in this way: Before the passing of the Education Act, 1902, Mr. Norris was a collector employed by the Corporation of London, and at that time the School Board for London existed; and when the School Board for London wanted a rate levied it sent a precept to the Corporation of the City to collect a certain rate, who were bound then to collect that rate, and they collected it through their collector, Mr. Norris. The Education Act, 1902, as applied to London by the Education (London) Act, 1903, did away with the School Board, and from that time the London County Council became charged with the duties which the School Board

formerly had; and it is no longer the law nor the practice that the Corporation should collect the education rate in the way in which it was collected before the passing of the Act of 1902. So far as that part of his duties goes, Mr. Norris has lost it, and, of course, he has lost the poundage which he used to receive for the performance of that duty, and he, therefore, claims compensation. Now the Education Act of 1902, by Sched. II. r. 16, says: "The officers of any authority whose property, rights and liabilities are transferred under this Act to any council shall be transferred to and become the officers of that council, but that council may abolish the office of any such officer whose office they deem unnecessary."

Mr. Norris was the officer of the City Corporation, and the property, rights, and liabilities of the City Corporation were not transferred, and therefore Mr. Norris is not a transferred officer in that sense. Rule 21 of the same schedule says: "Section 120 of the Local Government Act, 1888, which relates to compensation to existing officers, shall apply as respects officers transferred under this Act." Now, stopping there, it seems to me that although he was not a transferred officer under r. 16 he would become a transferred officer under the Act if he could come within this portion of s. 120, which says, "shall be entitled to have compensation paid to him for such pecuniary loss by the county council, to whom the powers of the authority, whose officer he was, are transferred." The difficulty in this case is that the powers of the authority whose officer he was are not transferred. It would look, therefore, as if he would get no compensation so far as either of those Acts goes, because he does not seem to come within any language which I have read yet.

But the Act goes on by r. 21 to provide for people who so far have not been provided for. It says, "and also shall apply (with the necessary modifications) to any other officers." Mr. Norris is an officer of the City Corporation, I think, "who, by virtue of this Act or anything done in pursuance of or in consequence of this Act, suffers any direct pecuniary loss by abolition of office or by diminution or loss of fees or salary." Now I think Mr. Norris has suffered diminution or loss of fees, and that the loss which he suffered was a direct pecuniary loss,

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because it was a money loss, and not a loss of something which might ultimately result in money; and I think that he lost what he did lose in consequence of the passing of this Act of Parliament, because if the Act had not been passed he would have gone on collecting just as he did before the Act was passed; for the relations between the School Board and the Corporation would have remained as they were, and therefore the basis of his employment would have remained what it was. Then r. 21 of Sched. II. concludes in this way, "in like manner as it applies to officers transferred under this Act." If he had been an officer transferred under the Act there would have been no difficulty about it. He was not, however, an officer who was transferred either directly or indirectly. He seems to be the very kind of person who is to be compensated by virtue of the latter part of this rule, and if he was not the sort of person to whom the latter part of the rule applies, it is not suggested in argument that there is any person who could be compensated under it. It does appear to me, therefore, that if r. 21, or a part of it, does not apply to Mr. Norris, then the whole of r. 21 after the word "Act" is absolutely meaningless. The difficulty is that s. 120 of the Local Government Act says, "shall be entitled to have compensation paid to him for such pecuniary loss by the county council, to whom the powers of the authority, whose officer he was, are transferred under the Act." That is the difficulty, that the powers of the authority, whose officer he was, are not transferred. I think that if those words must remain unqualified they would exclude the present applicant, but then I think at the same time they would prevent any effect being given to all the latter part of r. 21. I think, therefore, that the case is met by the words in the rule, "with the necessary modification." Here is a man, who is within the intention of r. 21, and although the Legislature intended to compensate him he will not be compensated if regard is paid to these words of s. 120 of the Act of 1888. Therefore I think it becomes necessary to make the modification in order that effect may be given to the latter part of r. 21, which, unless that modification is made, would, so far as I can see, not be capable of application to any class of case at all. I come to this decision with very great

deference to the other members of the Court, but I feel bound to say that I think that Mr. Norris is entitled to have compensation paid to him, and that this rule ought therefore to be made absolute.

RIDLEY J. I regret that I have come to a contrary decision to that expressed by my brother Darling, and I also regret the fact that according to my view of the Act this gentleman is not entitled to compensation. He was employed by the Corporation of London to collect what was then the education rate, which was payable out of the consolidated rate, to the London School Board. The education rate is now collected with the poor-rate by the guardians for the London County Council, and all the difficulty arises from that. That is the change which has taken place. He has lost the commission he formerly earned by collecting the education rate, but his employers are the same. There is no difference in respect to them. He was formerly the servant of the Corporation, and he is now the servant of the Corporation. It cannot be contended that he was employed either by the former School Board or by the present County Council. The Act of Parliament, in my opinion, only deals, with the transfer from one authority to the other. It deals, on the one side, with the authority which loses its powers, its property and its rights and liabilities, and on the other side with the authority which takes up that property and those rights, powers, and liabilities; that is to say, with the School Board on the one side and the London County Council on the other. We have here the case of a man who loses not his office but a portion of the fees which he used to gain in his office or employment. That case is not, I think, within the scope of the Act of Parliament at all. I think that the words in s. 120 of the Act of 1888, "whose officer he was," are a necessary part of this legislation. Rule 16 of Sched. II. of the Act of 1902, says: "The officers of any authority whose property, rights, and liabilities are transferred under this Act to any council shall be transferred to and become the officers of that council." It was agreed that this gentleman does not come within that category, because he was not a transferred officer. But it was

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argued that he might come within a branch of s. 120 of the Act of 1888 as an officer who had suffered direct pecuniary loss by diminution or loss of fees; which section is applied to the Education Act, 1902, by virtue of r. 21 of Sched. II. The section in question provides: "Every existing officer declared by this Act to be entitled to compensation, and every other existing officer, whether before mentioned in this Act or not, who, by virtue of this Act, or anything done in pursuance of or in consequence of this Act, suffers any direct pecuniary loss by abolition of office or by diminution or loss of fees or salary, shall be entitled to have compensation paid to him for such pecuniary loss by the county council, to whom the powers of the authority, whose officer he was, are transferred under this Act." Therefore it dealt not only with the officer who was declared to be entitled to compensation because he was transferred, but also with the officer who suffered by diminution or loss of fees or salary—the very words which are contained in r. 21 of the schedule to the Education Act of 1902. Now is it not apparent that the object of the Act, and of r. 21, is to deal with a person who was employed by the former authority, but was not solely employed by that authority, and who therefore was not transferred under r. 16, but who did suffer a direct pecuniary loss from the fact that some of his employment was taken away from him? In such a case, both r. 21 and s. 120 appear to me to say that he is to get compensation, as well as the transferred officer, from the county council or rather from the new authority, to whom the powers of the authority, whose officer he was, have been transferred. It is plain to my mind, therefore, that no loss of fees or salary is intended to be compensated except where such compensation is to be paid by the taking up authority, to whom the powers of the authority, whose officer the person who suffered the loss was, are transferred. Now, as I understand my brother Darling, he endeavours to enlarge the scope of the enactments, by saying that the latter part of r. 21 includes other officers who do not immediately come within s. 120 because they are not officers of the authority whose duties are transferred under the Act, and that the rule was intended to apply to those officers, although they were not employed by the former authority. I

cannot follow him in that endeavour to explain the Act in favour of this applicant. The words of r. 21 are also used in s. 120 of the Act of 1888, and they precede there the words "shall be entitled to have compensation paid to him for such pecuniary loss by the county council, to whom the powers of the authority, whose officer he was, are transferred under this Act." It is plain to me that in s. 120 those words apply to an officer who has only partially lost his salary, or the amount of fees to which he was entitled; and that in his case, as well as in the case of a totally transferred officer, it is necessary that he should have been the officer of the former authority.

I fail to see how I can say that the words "with the necessary modifications" in r. 21 can be pushed so far as to strike out the words "whose officer he was" in s. 120. That would, I think, be to alter the whole scope of these enactments. If it were merely a difference in the machinery that were indicated I should have less difficulty about it, but I cannot think that we ought to say that the effect of the latter part of r. 21 is to bring within the scope of this compensation clause a man who was not employed by the former authority.

It seems to me to be at least arguable that the words "direct pecuniary loss by abolition of office" were introduced to limit the officers who are to recover compensation to those who had received directly from their employers—that is to say, the former authority —a salary or fees, and who now will receive less. I think, however, that that point must not be too much emphasized, and that an explanation might be given of it in another sense; but on the whole it is an argument in favour of the view which I have somewhat regretfully come to on these Acts of Parliament.

Lord Alverstone C.J. This case has presented considerable difficulty to me, and that difficulty is accentuated by the fact that my brother Darling and my brother Ridley do not agree in their views, and each of them has given very good reasons for adopting the particular view which he takes. I agree with my brother Ridley in the opinion that r. 21 in Sched. II. of the Act of 1902 is not sufficient to give this particular officer compensation,

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Lord Alverstone C.J.

I am not impressed very much by the suggestion that this result creates an injustice. Mr. Norris is an annually appointed officer of the Corporation; he undoubtedly would collect in the particular year before the change the School Board rate, and would be paid for so doing on the poundage basis, and if he is not satisfied when he has to collect less he must make a fresh arrangement with the Corporation. He need not go on collecting unless he likes. I merely mention that as having some bearing on the question of direct pecuniary loss.

It is necessary to consider this section and these rules having regard to the purview of the Education Act. In the first place it should not be overlooked that the objects of the Act of 1902 were the transfer of the source from which the fund was to come, the transfer of the authority, the School Board, to the new authority, the county council, and the transfer of the property itself. Sect. 25 of the Education Act, 1902, says: "The provisions set out in the first and second schedules to this Act, relating to education committees and managers and to the transfer of property and officers and adjustment, shall have effect for the purpose of carrying the provisions of this Act into effect": in other words, the schedules are framed with reference not only to the transfer of powers, but also to the transfer of property. That fact necessitated certain modifications which have to be made in s. 120 of the Act of 1888. It must also be remembered that the Education Act deals with school boards, managers of schools, and the owners of schools themselves, and persons who undoubtedly were officers of the school boards, officers of managers, or servants of managers, and I think a third class, of which this gentleman is probably a very good example, officers of persons who had to do with the Act, yet who were not under the school board, or under the managers, and could not be said in any sense to be officers of the school board, or officers of the managers. Sect. 18 provides for the different way in which the fund is to be raised, and in which the expenses of the Act are to be met, the result of which is that the money in this case is no longer collected by the Corporation of London through their collector, but is collected by some other

officer representing some other rating authority. Now, the first of the rules in the schedule which I think material to be considered is r. 16, which provides that: "The officers of any authority whose property, rights and liabilities are transferred under this Act to any council shall be transferred to and become the officers of that council, but that council may abolish the office of any such officer whose office they deem unnecessary." That gives the simple case where the officer of a school board goes over bodily; if his office is abolished he gets compensation under r. 21. Then we come to r. 21, which had to provide for the different sets of people whose rights, powers and property were being affected: "Section 120 of the Local Government Act, 1888, which relates to compensation to existing officers, shall apply as respects officers transferred under this Act, and also (with the necessary modifications) to any other officers who, by virtue of this Act or anything done in pursuance or in consequence of this Act, suffer direct pecuniary loss by abolition of office or by diminution or loss of fees or salary, in like manner as it applies to officers transferred under this Act." That this rule applies to the officers of managers as well as to the officers of the school board seems to be perfectly plain, because when we look to the modification which is indicated in clause (*c*) we see this: "Any reference to powers transferred shall be construed as a reference to property transferred." It is important to observe, as my brother Ridley has already pointed out, that the words "direct pecuniary loss by abolition of office or by diminution or loss of fees or salary" were already in s. 120 of the Act of 1888; but the only cases in which there could be compensation paid under s. 120 were where the officer was the officer of the authority from whom the powers were taken away, and the compensation was to be paid by the authority to whom those powers were transferred. In the new state of matters that was not sufficient; the Education Act contemplates the transfer of the property, and accordingly r. 21 (*c*) says any reference to property transferred shall be equivalent to powers transferred for the purpose of s. 120. Take the case of an officer of a body whose property is transferred, and whose office is abolished although he himself has not been

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transferred under r. 16 because no powers of that body have been transferred—his office is abolished, or there is diminution of his fees or salary, therefore he is to have compensation. It seems to me that there was a clear necessity for this modification of s. 120 by reason of the complex subject-matter with which this Act of Parliament was dealing.

Lord Alverstone C.J.

In the present case Mr. Norris was a servant or collector of the rating authority, the Corporation of London, who had to obey the precept of the school board. He was not the officer of any body whose powers were transferred to the council; he was not the officer of any body whose property was transferred to the council. I do not express any opinion on the question whether it can fairly be said that he suffered direct pecuniary loss by virtue of the Act, or of anything done in reference to it, but at any rate he can only be compensated for any loss that he has suffered if he is an officer referred to in the latter part of r. 21. In my judgment, the words of the latter part of that rule were necessary in order to deal with the case of persons who might be the servants possibly of the school board, and yet not be their officers, because they did not solely work for the school board, but only collected money or did some duties for them. Again, there might be officers who were not transferred because they were only the officers or servants of managers, and, the powers of the managers going over, their duties and thereby their salaries are diminished, and they are also entitled to get compensation. I cannot construe the words "with the necessary modifications" as enabling us to do more than modify s. 120 of the Act of 1888 in order to give effect to the clear purpose and intention of the Act of 1902. It would in my opinion be going too far to say that under such words as "with the necessary modifications" the Courts can legislate in the sense of bringing within the purview of the section, or of such legislation, persons who, in the ordinary construction of the words, would be outside it. If persons who are in the employment of third persons from whom no powers are taken away, and from whom no property is taken away, are to be held to be entitled to compensation, then wider language must be used. With great respect to my brother Darling's opinion, of which I fully feel the weight, as I do the weight of the reasons

which he has expressed, I come to the conclusion that this rule should be discharged. 1906

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Rule discharged.

Solicitors for applicant: *Rivington & Son.*
Solicitor for County Council: *Seager Berry.*

A. P. P. K.

BARNARD *v.* BARTON AND OTHERS.

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April 17.

Licensing Acts—Offences—Selling Intoxicating Liquor without Licence—Offence of Trifling Nature—Summary Jurisdiction Act, 1879 (42 & 43 *Vict.* c. 49), *s.* 16.

For an incoming tenant of a public-house to carry on the business of the house for a period of nine days without a licence is a serious offence; and the facts that the outgoing tenant had been duly licensed, and that for nine days after his departure, the period in question, no sessions sat at which a temporary transfer of his licence could be applied for, do not warrant a Court of summary jurisdiction in treating the offence as one of a trifling nature within the meaning of s. 16 of the Summary Jurisdiction Act, 1879.

CASE stated by justices of the petty sessional division of Freshwell, in the county of Essex, on the hearing of certain charges against the respondent Barton under s. 3 of the Licensing Act, 1872 (35 & 36 Vict. c. 94), for unlawfully selling by retail intoxicating liquor which he was not licensed to sell, and against the respondents Edward William Lake and Frederick Turner under s. 5 of the Summary Jurisdiction Act, 1848 (11 & 12 Vict. c. 43), for aiding and abetting the commission of the offences charged against the respondent Barton.

The special case set out the following facts:—

On April 13, 1903, one Joseph Henry Anstey was duly licensed by the licensing justices for the division of Freshwell to sell intoxicating liquors by retail at a house situate at Little Sampford, in the county of Essex, within the said division of Freshwell, called the Fighting Cocks.

The said house was the property of Messrs. Green, King & Sons, Limited, brewers, of Bury St. Edmunds.

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The respondent Lake was the managing director and the respondent Turner was agent for Messrs. Green, King & Sons, Limited.

On October 15, 1904, the said J. H. Anstey gave up possession of the said house, and on the same day the respondent Barton took possession thereof as tenant of Messrs. Green, King & Sons, Limited, without having previously obtained any authority from the justices to sell intoxicating liquor therein by retail.

The several sales of intoxicating liquor alleged to have been made by the respondent Barton were in fact made by him.

The said sales were made with the knowledge and consent, and under the instructions of the respondents Lake and Turner.

On October 24, 1904, proper notice having been given of intended application, the said J. H. Anstey applied to the licensing justices for the Freshwell division and obtained a transfer of his licence to the respondent Barton.

The justices of the Freshwell division sit only once a month, and there were no petty sessions at which application could have been made for a temporary transfer of the licence to the respondent Barton between September 20 and October 24, 1904.

In cases of transfers of licensed premises taking place on days on which no petty sessions are held, it is the practice in some petty sessional divisions (including the Freshwell division) to apply for the temporary transfer at the next available petty sessions.

The justices were of opinion that all the charges were proved against the respondents, but that the respondents had no intention of infringing the provisions of s. 3 of the Licensing Act, 1872, and that the offences proved to have been committed were of so trifling a nature that it was inexpedient to inflict any punishment. They therefore dismissed all the charges under the power conferred upon them by s. 16 of the Summary Jurisdiction Act, 1879. (1)

(1) Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49).

Sect. 16: "If upon the hearing of a charge for an offence punishable on summary conviction under this Act, or under any other Act, whether past or future, the Court of summary jurisdiction think that though the charge is proved the offence was in the particular case of so trifling a nature

The question for the opinion of the Court was whether the decision of the justices was right in law.

C. E. Jones, for the appellant. This Court has power to overrule the discretion of the justices under s. 16 of the Summary Jurisdiction Act, 1879, in a case where the offence is serious in its nature, and where, as in the present case, there are no mitigating circumstances: *Phillips* v. *Evans*. (1) To carry on the business of a public-house for nine days without a licence cannot be considered as anything but a serious offence.

THE COURT then called upon

A. H. Poyser, for the respondents. It is of the utmost importance that justices should be left free and unfettered in the exercise of the discretion conferred upon them by s. 16 of the Summary Jurisdiction Act, 1879. It is only in extreme cases that this Court asserts the right to overrule that discretion; where, for example, the justices have interfered with the jurisdiction of some other tribunal, as in *Phillips* v. *Evans* (1), where justices took upon themselves to ignore the decision of Inland Revenue Commissioners. The section which confers upon justices this discretion assumes that serious offences, such as larceny and embezzlement, may in certain cases be treated as of a trifling nature. It has been held that offences against by-laws, though serious in themselves, may become trifling under particular circumstances: *Salt* v. *Scott Hall* (2); *Pomeroy* v. *Malvern Urban District Council*. (3) In the present case it is to be borne in mind that the house in question was the only public-house in Little Sampford, and that the inconvenience to the public would be serious if the house were closed for nine days; that it is impossible to arrange that new tenants shall take possession only on the days when the sessions sit; and that at the earliest opportunity after the house changed hands a temporary transfer was applied for.

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that it is inexpedient to inflict any punishment, or any other than a nominal punishment,—

"(1.) The Court without proceeding to conviction may dismiss the information. . . . ."

(1) [1896] 1 Q. B. 305.

(2) [1903] 2 K. B. 245.

(3) (1903) 67 J. P. 375.

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KENNEDY J. It is very important not to limit the discretion entrusted to justices by s. 16 of the Summary Jurisdiction Act, 1879, and this Court will not review the exercise of that discretion if there is any substantial ground for its exercise. The discretion is conferred by statute in the following terms:—

[The learned Judge read s. 16 of the Act of 1879, and proceeded:—] Now it may be that an offence serious in its nature can be rendered trifling by the circumstances under which it was committed; on the other hand, an offence may be in its nature trifling; for example, a merely technical or casual breach of a by-law, if there be no deliberate intention to commit a breach thereof, is in its nature, as well as in its circumstances, an offence which might be treated by justices as one of a trifling nature within the meaning of the enactment, which, in my view, would cover cases trifling in themselves as well as in their circumstances.

In the present case there is really nothing suggested which could mitigate the offence or warrant its being regarded as trifling, assuming it to be in its nature a serious offence. If there were it may be that we should feel bound not to interfere with the discretion of the justices; but there is nothing of the kind. We have therefore simply to see what the nature of the offence is. To my mind it is a very serious offence. The licensing laws are enacted with a view to public order, a matter of the utmost importance; that an unlicensed person should deliberately for nine days carry on to a substantial extent a business which it is unlawful for him to carry on without a licence, is a serious breach of the law, and none the less because, as has been stated, the justices, assuming that they know such offences have been committed, take no cognizance of that fact when, at the subsequent sessions, application is made for a transfer of the licence to the person who has thus in the meantime been breaking the law. It is hardly a fair contention on behalf of the respondents to argue that the justices in so acting have created anything like a custom to break the law, and thus attempt to throw the cloak of magisterial action over the illegal acts of the respondents. When it is stated in the special case that it has been the practice in some petty sessional divisions, including the division in question, to apply for a temporary transfer at the next petty sessions, that means nothing

more than this, that people have been breaking the law with impunity in other divisions as well as in the Freshwell division. It is next said that the justices considered that in this case there was no intention of breaking the law; as if a person without a licence could carry on for nine days the business of a public-house keeper without breaking the law, even though he may have intended to carry it on reputably. As it stands, the offence is in its nature a serious one, and there is nothing to induce us to treat it as trifling in the facts that the house is the only public-house in Little Sampford and that the respondent Barton carried on the business by the direction of the managing director and agent of the brewers. There is therefore nothing to prevent us from holding that the offence was a serious one and one which ought not to have been treated by the justices as trifling. There is no doubt that in such a case we have power to review the exercise of their discretion. That was decided by Lindley and Fry L.JJ., sitting as a Divisional Court, in *Phillips* v. *Evans*. (1) In that case the owner of a dog having applied for and having failed to obtain a certificate of exemption from duty in respect of his dog, refused to take out a licence and was charged before a Court of summary jurisdiction. The justices refused to convict on the ground that as, in their opinion, the defendant ought to have been allowed exemption from duty, his offence was trifling; but the Divisional Court held that the justices had no jurisdiction to review the decision of the Commissioners as to granting or withholding a certificate of exemption, and that the offence of refusing to take out a dog licence was not an offence of a trifling nature to which s. 16 of the Summary Jurisdiction Act, 1879, would apply. Similarly, it seems to me, that for an unlicensed person to keep open a public-house for nine days is not, prima facie, an offence of a trifling nature. There might conceivably have been special facts which, if stated by the magistrates, might have made such an offence trifling under the particular circumstances; but the only fact stated here, namely, that there was a bona fide intention of applying for a transfer when the time came, cannot avail the respondents when it is clear that in the interval they were quite prepared to break the law and carry on

(1) [1896] 1 Q. B. 305.

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the business to suit their own convenience instead of making proper arrangements to retain the licensed tenant until the date when a proper transfer to the incoming tenant could be obtained. In my judgment, therefore, the justices ought to have convicted. I do not say that they ought to have imposed a severe penalty, but I do say that there is nothing to make this offence a trifling one.

RIDLEY J. I entirely concur.

Case remitted to the justices.

Solicitor for appellant: *F. P. Sutthery.*

Solicitor for respondents: *A. Toovey, for Bankes, Ashton & Holley, Bury St. Edmunds.*

A. P. P. K.

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Jan. 17.

THE KING *v.* THE LICENSING JUSTICES OF CHESHIRE.

Ex parte KAY'S ATLAS BREWERY, LIMITED.

Licensing Acts—Justices—Bias—Reference of Renewal of Licence to Quarter Sessions—Right of Licensing Justice to sit on Compensation Committee—Licensing Act, 1904 (4 *Edw.* 7, *c.* 23), *s.* 1, *sub-s.* 2, *s.* 5, *sub-s.* 5.

A justice of a borough who has been appointed a member of the committee of quarter sessions under s. 5, sub-s. 5, of the Licensing Act, 1904, is not disqualified from acting on the question of the refusal of the renewal of a licence by the fact that he presided at the meeting of the licensing justices of the borough at which it was decided to refer the question of the renewal of that licence to quarter sessions under s. 1, sub-s. 2, of the Act.

RULE nisi calling upon the justices of the Cheshire County Licensing Committee (sitting as the compensation authority under the provisions of the Licensing Act, 1904) to shew cause why a writ of certiorari should not issue to bring up and quash an order made by them refusing the renewal of the licence of the Grapes Inn, Market Place, Hyde, in the county of Cheshire.

Kay's Atlas Brewery, Limited, the applicants, were the owners of the Grapes Inn, which was an ante-1869 beerhouse, and was also licensed for the sale of wines.

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On March 2, 1905, the licensing justices for the borough of Hyde, which was not a county borough, but had a separate commission of the peace, held their meeting and referred the question of the renewal of the licence of the Grapes Inn to the quarter sessions for the county under s. 1, sub-s. 2, of the Licensing Act, 1904. At this meeting a Mr. Blackwell, a justice of the peace for the borough of Hyde, presided.

On June 9, 1905, the committee of quarter sessions, appointed under s. 5, sub-s. 2, for licensing purposes, held their meeting, and after hearing counsel for the justices of the borough of Hyde and for the brewery company, refused the renewal of the licence of the Grapes Inn.

Mr. Blackwell, who had been appointed by the justices of the borough of Hyde a member of the committee of quarter sessions under s. 5, sub-s. 5, of the Licensing Act, 1904, was present at the meeting of the committee of quarter sessions, and left the Court with the other justices when they retired to consider the question of the licence of the Grapes Inn and returned with them when their decision was given. He had, however, taken no part in instructing counsel to appear for the justices of Hyde to oppose the renewal.

Before the case was opened, counsel for the brewery company had objected to any justice who had sat on the licensing committee for the borough of Hyde at the meeting on March 2 sitting and adjudicating on the question of the renewal of the licence of the Grapes Inn.

This rule was then obtained on the ground that the committee was improperly constituted by reason of Mr. Blackwell's being disqualified from sitting and adjudicating on the question of the renewal of the licence of the Grapes Inn. (1)

(1) By the Licensing Act, 1904, (4 Edw. 7, c. 23), s. 1, sub-s. 2: "Where the justices of a licensing district, on the consideration by them, in accordance with the Licensing Acts, 1828 to 1902, of applications for the renewal of licences, are of opinion that the question of the renewal of any particular existing on-licences requires consideration on grounds other than those on which the renewal of an existing on-licence can be refused by them, they shall refer the matter to quarter sessions, together with their report thereon, and quarter sessions shall consider all reports so made to them, and may, if they think it expedient, after

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Danckwerts, K.C., and *R. M. Montgomery* shewed cause against the rule. Mr. Blackwell was entitled to sit and adjudicate on the committee of quarter sessions, although he had taken part in the consideration of the question of the renewal of this particular licence at the meeting of the licensing justices. The proceedings before the committee of quarter sessions are not an appeal from the decision of the licensing justices. The effect of s. 1, sub-s. 2, of the Act of 1904 is only to allow the licensing justices in such a case as the present to refer the question of the renewal to quarter sessions. They have no power themselves either to grant or refuse the renewal in such a case. That power is given to the quarter sessions alone. Sect. 5, sub-s. 5, gives the justices of the borough power to appoint one of their number to to act on the committee of quarter sessions, and it cannot have been intended that the justice to be so appointed should never be one of the licensing justices. No doubt on general principles justices who instruct counsel to appear for them to oppose a renewal would be debarred from adjudicating on the question, but in this case Mr. Blackwell took no part in instructing counsel. The proceedings created by the Licensing Act, 1904 are entirely novel: *Rex* v. *Tolhurst* (1), and the cases as to the impropriety of justices who had taken part in the consideration of questions

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giving the persons interested in the licensed premises, and, unless it appears to quarter sessions unnecessary, any other persons appearing to them to be interested in the question of the renewal of the licence of those premises (including the justices of the licensing district), an opportunity of being heard and, subject to the payment of compensation under this Act, refuse the renewal of any licence to which any such report relates."

By s. 5, sub-s. 2: "Quarter sessions may delegate any of their powers and duties under this Act to a committee . . . . and, except in a county borough, shall so delegate their power . . . . of determining any question as to the refusal of the renewal of a licence under this Act . . . ."

Sub-s. 5: "The justices of any borough, not being a county borough but having a separate commission of the peace, shall be entitled to appoint one of their number to act, with reference to the determination of any question as to the refusal of the renewal of a licence under this Act and any matters consequential thereon, on the committee appointed under this section by quarter sessions, and for those purposes any justice so appointed shall be deemed to be an additional member of the committee."

(1) [1905] 2 K. B. 478.

sitting to review their own decisions at quarter sessions have no application.

Trevor Lloyd (*S. S. Kay* with him), in support of the rule. A justice who has taken part in the preliminary proceedings under s. 1, sub-s. 2, at which it is decided to refer the question of the renewal to quarter sessions, is disqualified from sitting on the committee which has to decide the question. He is by s. 1, sub-s. 2, an interested person, and is entitled to appear by counsel to oppose the renewal. Counsel appears for all the justices of the licensing district, and it is immaterial that this particular gentleman did not expressly instruct counsel. The reference to quarter sessions is in the nature of an appeal, and on general principles licensing justices are excluded from sitting on appeals from the decisions of tribunals of which they formed part: *Reg.* v. *Justices of Hertfordshire*. (1) There ought to be no suspicion of bias on the part of any member of the committee who have to grant or refuse the renewal: *Allinson* v. *General Council of Medical Education* (2); and here the fact that Mr. Blackwell presided at the meeting of the licensing justices, when it was decided to refer the question of the renewal of the licence, shews that he was strongly biased against the renewal.

LORD ALVERSTONE C.J. This case to my mind presents very considerable difficulties, and although I think that we ought to discharge the rule, it is not by any means a clear case. Apart from the provisions of the Act of 1904, in my opinion a gentleman who has been a party to a decision which has been come to by the licensing authority to report a particular licence, and to refer the question of the renewal of that licence to quarter sessions, ought not to sit when the question is determined by the committee of quarter sessions as to what the action on that report should be. The position of the justice in this case seems to me to be like the position of those gentlemen who were not, on the authorities to which our attention has been called, entitled to sit at quarter sessions, and the difficulty that I feel is increased by the admission of Mr. Danckwerts that if this gentleman had been one of the justices who instructed

(1) (1845) 6 Q. B. 753. (2) [1894] 1 Q. B. 750

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counsel to appear and support the view of the licensing justices before the committee of the quarter sessions he would have no right to sit on that committee.

If the consideration of the question by the committee ought to be regarded as in the nature of an appeal from the decision of the licensing justices I should have thought that a justice who had come to a decision on a question which was the subject of an appeal ought not to sit when that appeal was heard. But when I look at the Act of 1904 I cannot think that it would be passed as it is had it been intended to prevent a gentleman in such a position as this justice from sitting on the committee of quarter sessions. As I pointed out in *Rex* v. *Tolhurst* (1), the grounds on which the licensing justices may be of opinion that the renewal of a particular licence requires consideration are other grounds than those on which the renewal of an existing on licence can be refused by them. Sect. 1, sub-s. 2, which gives them this power of reporting a licence to the quarter sessions, excludes the grounds on which this gentleman, as a member of the body of licensing justices, would have had to act judicially. No doubt the justices must act as they would have acted previously, namely, on sworn evidence; but as we pointed out in that case, the amount of evidence which may be sufficient for the purpose of enabling the justices to form the opinion that a licence should be reported to quarter sessions may be different from the amount which might be sufficient if they had to decide judicially whether or not a particular licence should be renewed or refused. The evidence of the character of a district and the locality of a public-house and the number of other public-houses in the district may be sufficient to justify the justices in making a report to quarter sessions under s. 1, sub-s. 2, of the Act. It is a proceeding of a novel kind, a preliminary step taken by the licensing justices acting, I still think, in a judicial capacity, and embodying their view in a report to the quarter sessions. It is, therefore, not the ordinary case of the decision of licensing justices coming before the quarter sessions on an appeal. Then comes s. 5, sub-s. 5. [His Lordship read the sub-section.] It seems to me that if that provision had intended to prevent the members of the

(1) [1905] 2 K. B. 478.

licensing committee from being appointed on the committee of quarter sessions the sub-section would have gone on to say, "such justice not being a member of the licensing committee of the borough," or that there would have been something to indicate that a justice who had taken part in making a report under s. 1, sub-s. 2, was not eligible to be appointed a member of the committee of quarter sessions under s. 5, sub-s. 5.

As was pointed out by my brother Darling during the argument, if the borough were to be unable to appoint on the committee of quarter sessions a member of its own licensing committee it would be deprived of the power of sending to the committee of quarter sessions a justice who would have experience in licensing matters, and in such a case as this the borough would not be represented on the committee of quarter sessions by a gentleman who knew, and who would be able judicially to consider the evidence before that committee, having regard to the information that he had acquired as a member of the licensing committee, not for the purpose of giving a decision, but for the purpose of making a report. On the whole, therefore, I think that it would be inconsistent with the scheme of the Act to give effect to the contention that no justice who has taken part in making the report is eligible to sit on the committee of quarter sessions, who will have to act on that report.

I think that it is plain from rule 11 of the Rules made under the Act that the connection between the licensing justices and the compensation authority—that is to say, the committee of quarter sessions—was intended to be very close. It is provided that there may be a meeting between the two bodies, and if all the licensing justices are members of the committee, there need not be a meeting at all.

From this it would seem plain that the Legislature did not intend that the knowledge acquired by justices as members of the licensing committee should be excluded from the committee of quarter sessions. This confirms me in the opinion I have expressed that the report by the licensing justices is not in the nature of a judicial decision, and that the consideration of that report by the committee of quarter sessions is not an appeal from that decision in such a sense that a justice who has been a

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party to the report is precluded from sitting on the committee when the report comes up for consideration.

No doubt the justice might if he wished have appeared by counsel before the committee to oppose the renewal of the licence. Sect. 1, sub-s. 2, provides for persons interested in the renewal of the licence being heard, "including the justices of the licensing district." That only means, I think, to give them a locus standi if they choose to appear. As a matter of fact, this gentleman did not appear, and took no part in instructing counsel to appear for the licensing justices, and I do not think that the mere fact that he might have appeared if he had wished is sufficient to exclude him from the committee. If it were it would, of course, exclude all licensing justices from acting on the committee, which, as I have already pointed out, would not be convenient. Still, I confess that I am somewhat pressed by the fact that others of his fellow justices did appear by counsel before the committee, and that he might have been jointly represented with them if he had chosen.

As I said before, the case to my mind presents considerable difficulties, but on the whole I have come to the conclusion that, since the statute gave express power by s. 5, sub-s. 5, to the justices of a borough (not being a county borough, but having a separate commission of the peace) to appoint one of their number to act on the committee of quarter sessions, it did not intend to exclude from that appointment a justice who was a member of the licensing committee of the borough, and who had taken part in making a report which would come before the committee of quarter sessions for consideration.

RIDLEY J. I am of the same opinion, but I do not feel so impressed by the difficulties of the case as my Lord has been.

I think that the Court in coming to the decision to which we have come is not in any way contravening the ancient principle, to which I adhere, that no justice who has come to any decision in any judicial proceeding before him ought to sit, or is even qualified to sit, in the tribunal which has to determine whether that decision is right or wrong. I think this case can be decided quite independently of that principle. The Act of 1904 is an

entirely new departure from the former licensing law, and one of the chief differences is that, instead of the licensing justices before whom the question of the renewal of any particular on-licence may come, having to decide whether that licence should be renewed or not, they may, under certain circumstances—that is to say, if they are of opinion that the question of the renewal requires consideration on grounds other than those on which they have power to refuse the renewal—refer the matter to quarter sessions, together with a report on the licensed house. That is not, I think, a judicial proceeding or decision. If the licensing justices think that the question of the renewal requires consideration, they can only refer the matter to another tribunal for decision. It was even argued in *Rex* v. *Tolhurst* (1) that so little was this report a judicial proceeding that it need not be based on sworn evidence; but that case decided, rightly as I think, that the former law relating to proceedings before justices applied to these proceedings also, and that the report must be based on evidence taken on oath. That, however, does not make the report, in my opinion, a decision against anyone in such a sense as to disentitle the justices taking part in making it from appearing on the committee who are to take action upon it. The proceeding before the committee of quarter sessions is not an appeal from the decision of licensing justices—it is the decision of the question referred to them for decision by the licensing justices. For this purpose it was obviously necessary to establish some sort of relation between the licensing justices who had to make the report and the committee of quarter sessions who were to act upon that report, and that relation is established, in the case of a borough which is not a county borough, but has a separate commission of the peace, by s. 5, sub-s. 5.

I cannot help thinking that if the Legislature had intended that any person taking part in proceedings under s. 1, sub-s. 2, should be disqualified from being appointed a member of the committee of quarter sessions under s. 5, sub-s. 5, the Act would have said so in plain terms, and unless it does say so, I can see no principle which prevents this gentleman from acting on the committee. I therefore agree that this rule should be discharged.

(1) [1905] 2 K. B. 478.

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DARLING J. I am of the same opinion. The general rule that persons who had once decided a question should not take part in reviewing their own decisions was not without exception. Judges of the Queen's Bench, Common Pleas, and Exchequer, when those old Courts existed, often sat with other judges of the same Court on appeals from their own decisions; and there is still the case of the Court for the Consideration of Crown Cases Reserved, in which the judge who has reserved a point for the consideration of the Court often sits without any objection, and takes part in the decision of the point reserved. Legislation was necessary to take away the power formerly possessed by the judges of the old Courts to review their own decisions, but even that legislation leaves untouched what occurs in the Court for the Consideration of Crown Cases Reserved.

In considering the position created by the Licensing Act, 1904, we must, I think, regard the intention with which the Act was passed. It gives the justices a power which is not precisely like any power exercised in the ordinary practice of Courts of law, and some of the things which the Act empowers justices—whether acting as a licensing committee or as a committee of quarter sessions—to do may be done sometimes when they are acting as a Court and sometimes when they are not a Court at all.

Sect. 1, sub-s. 2, provides for the making of a report as to the renewal of the licence of a house which they think requires consideration, and for this purpose they may use their own knowledge of the locality and of the number of public-houses and of the habits of the people. That report goes to the justices at quarter sessions, and certain people have the right to appear there and advocate or oppose the renewal, but they must be persons who are interested in the renewal or refusal of the licence. Sect. 2, sub-s. 2, says that among the persons interested the justices of the licensing district are included—not only, it must be remarked, the justices who had made the report, but all the justices of the licensing district. Therefore the Legislature has said of this gentleman and of every other justice in the borough that he is an interested person. It has done so with its eyes open, and if it had stopped there the

justices of the licensing district would not have been able to do anything more. They would not have been able to attend quarter sessions. They would not have been able to appear there even by counsel. The sub-section, however, has given them the power to appear and be heard. But did the Act mean to give them any power other than that possessed by an ordinary justice from whose decision an appeal is brought to quarter sessions? I think it did, because of s. 5, sub-s. 5, which gives to all the justices of a borough, not being a county borough, but having a separate commission of the peace, the power to appoint one of their number to act on the committee of quarter sessions. It is, therefore, not only the justices who sat as a licensing committee, but all the justices of the borough who have power to make the appointment, and they may elect one of their number to act on the committee. The Legislature therefore contemplated, first, the making of the report by the licensing committee; then that the justices of the licensing district, being interested persons, might appear and be heard on the consideration of the report; and then that the justices of the borough might, if they liked, send one of their number to act "with reference to the determination"—the words really could not be stronger—"of any question as to the refusal of the renewal of a licence." Evidently the Legislature thought that the committee of quarter sessions might want some information from the justices of the borough over and above that which was contained in the report, and it is therefore provided that in addition to making the report they may send one of their number to take part in the consideration of the report. Now, who would be the best person for the justices to choose? I suppose they would not wish the justice who knew least about the public-houses in the borough to go. The very reason why he is sent from the borough is, as I think, that he has knowledge on the particular facts relating to the borough which is not possessed by the other members of the committee of quarter sessions, and that he should be able to place that knowledge at their disposal. Clearly to my mind a justice who had been sitting and taking part in the deliberations of the licensing committee, and who had helped to make the report, would know most about it. It is contended that such a

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Darling J.

man is biased. Well, it may be or it may not be that he is, but the Legislature have, as it seems to me, deliberately provided that such a justice may take part in the consideration of the report. Of course, he may be biased (if that word is to be used) in favour of the report or against it, but no doubt he goes to the committee of quarter sessions with a formed view on the subject of the report. I think this legislation makes an absolute exception to the ordinary rule governing judicial proceedings. Nothing like it has occurred before. There are no words to limit the class of justice who may be appointed by the borough on the committee. There is nothing to say that he is not to be a justice who has already considered the matter: on the contrary, as I have pointed out, the whole object of the Act would seem to be that the justice should be a justice who was conversant with the matter. If it had been intended to limit the justice to be appointed on the committee to justices who were not on the licensing committee, or to justices who had taken no part in the particular report, I cannot doubt that words to that effect would have been inserted. There are no such words and they cannot be implied, and therefore, with less hesitation than my Lord, I think that the decision to which he has come is correct.

Rule discharged.

Solicitors for applicants: *Sharp, Parker, Pritchards, Barham & Lawford, for F. Knowles, Hyde.*

Solicitors for res ondents: *Philpot & Morrell, for R. Potts, Chester.*

A. P. P. K.

[IN THE COURT OF APPEAL.]

C. A.
1906
Feb. 1.

GOLDSCHMIDT *v.* OBERRHEINISCHE METALLWERKE.

Practice—Equitable Execution—Appointment of Receiver—Special Circumstances—Impediments to Ordinary Execution—Defendants out of the Jurisdiction—Judicature Act, 1873 (36 & 37 *Vict. c.* 66), *s.* 25, *sub-s.* 8.

The plaintiff in an action had obtained judgment against the defendants, who were a company incorporated, and carrying on business as manufacturers, in Germany, and who had no property within the jurisdiction which could be taken in execution by any ordinary process of execution. It appeared that divers customers of the defendants in this country either were, or would shortly become, indebted to the defendants for goods supplied, but the plaintiff had no means of ascertaining particulars of any such debts, and therefore could not make an affidavit in the form No. 25, Appendix B, to the Rules of the Supreme Court, in order to found garnishee proceedings; and it further appeared that there was reason to believe that the defendants were endeavouring to collect all debts due to them from customers in this country in order to avoid such proceedings:—

Held that, having regard to the special circumstances, the case was one in which a receiver of such debts as aforesaid might be appointed by way of equitable execution.

Appeal against the refusal of Channell J. at chambers to appoint a receiver by way of equitable execution as after mentioned.

An action had been brought by the plaintiff against the defendants, a company incorporated, and carrying on business as manufacturers, in Germany, complaining of breaches by the defendants of an agreement by which the plaintiff was appointed agent for sale of defendants' goods in Great Britain, and was to receive a commission on sales effected by him as therein specified, and claiming an account and payment of moneys due to him under the said agreement. Upon the trial of this action judgment was given in favour of the plaintiff's claim with costs up to and including judgment, and that the amount due to the plaintiff should be ascertained by an inquiry before an official referee. A master had upon the taxation of the plaintiff's costs issued an interim certificate for 250*l.* on account of his costs. It was stated on affidavit by the plaintiff that the defendants had no place of

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business in this country, and no assets or property which could be taken in execution by fieri facias, elegit, or any ordinary process of execution, and that the only assets they had in this country were the debts due and owing, and which would become due and owing presently, to them by persons or firms to whom they had supplied goods. A list of persons or firms to whom, as the plaintiff was informed and believed, the defendants had supplied goods, and who were or would be indebted presently to the defendants for those goods, was made an exhibit to the affidavit, and it was therein further stated that the plaintiff had been informed by several of those persons, and believed that representatives of the defendants had since the date of the judgment called upon them to obtain payment of their accounts, and had stated to them that the defendants would shortly change their name. The affidavit further stated that the plaintiff verily believed that it was the defendants' intention to collect all the moneys due to them in England, and so to defeat the plaintiff and prevent him from obtaining the fruits of his judgment. The plaintiff applied to Channell J. at Chambers, under the Judicature Act, 1873, s. 25, sub-s. 8, for an order for the appointment, by way of equitable execution, of a receiver to receive all debts or sums of money due and owing, or thereafter becoming due and owing, to the defendants by persons and firms in the United Kingdom, but the learned judge refused the application.

Powell, K.C. (*C. Tindale Davis* with him), for the plaintiff. The circumstances of this case are such as to justify the appointment of a receiver by way of equitable execution under the Judicature Act, 1873, s. 25, sub-s. 8. See *per* Fry L.J. in *Manchester and Liverpool District Banking Co.* v. *Parkinson*. (1)

[VAUGHAN WILLIAMS L.J. Has not the plaintiff power to enforce his judgment by garnishee proceedings under Order XLV., r. 1?]

There is a difficulty in taking those proceedings. Although the plaintiff knows the names of customers of the defendants, from whom, no doubt, debts are either due, or will shortly become due to them, he does not know the particulars of such debts; he

(1) (1888) 22 Q. B. D. 173.

cannot, therefore, specify any particular sum due, nor can he tell whether any sum is already due, or only will become due on the expiration of some period of credit; and there is no power to examine the defendants, who are out of the jurisdiction, under Order XLII., r. 32, as to their means of satisfying the judgment so as to ascertain these particulars. It appears from Appendix B to the Rules of the Supreme Court, Form No. 25, that the affidavit in support of an application for a garnishee order nisi must specify the amount of some debt due from a particular person to the judgment debtor. There are no means by which the plaintiff can compel the defendants' customers to furnish him with particulars of their debts. [He also cited *Anglo-Italian Bank* v. *Davies*. (1)]

Notice of appeal had been given to the defendants' solicitors, but the defendants were not represented on the appeal.

VAUGHAN WILLIAMS L.J. I think that the special circumstances of this case are sufficient to entitle the plaintiff to the remedy for which he applies, and to entitle himself to which he must shew that the circumstances are such as to render it practically very difficult, if not impossible, to obtain any fruit of his judgment, unless what has been called equitable execution be granted to him. In the case of *Manchester and Liverpool District Banking Co.* v. *Parkinson* (2), Fry L.J. said in giving judgment, in reference to the Judicature Act, 1873, s. 25: "I do not say that there would have been no jurisdiction to appoint a receiver under that section, if there had been special circumstances in the case rendering it just or convenient to make such an order. It may be, for instance, that an order could be made for appointment of a receiver to hold property liable to execution, to prevent someone making away with it, or to get in debts, where under particular circumstances it was a more convenient mode of procuring satisfaction of the judgment than the usual process of attachment." In my judgment this case falls within those words. It appears to me to fall within both the categories indicated by the words of the learned Lord Justice, one being where the receivership is granted for the

(1) (1878) 9 Ch. D. 275. (2) 22 Q. B. D. 173.

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purpose of getting in debts under circumstances which render that a more convenient mode of procuring satisfaction of the judgment than garnishee proceedings, and the other being where it is granted for the purpose of preventing someone from making away with property liable to execution. On the facts before us there does seem to be a likelihood that these foreign defendants will withdraw the sums owing to them from any possibility of being made available by way of execution in this country. Under these circumstances I think we are justified in making an order for a receiver under the Judicature Act, 1873, s. 25, sub-s. 8. The appeal will, therefore, be allowed.

STIRLING L.J. and FLETCHER MOULTON L.J. concurred.

Appeal allowed. (1)

Solicitor for the plaintiffs: *J. W. Browne.*
Solicitors for the defendants: *Joseph & Hyam.*

(1) The order was made appointing the plaintiff receiver, without remuneration or security, of the debts due to the defendants up to the amount of 300*l.*, with liberty to apply to increase that amount, if necessary.

E. L.

C. A.
1905
Dec. 15.

[IN THE COURT OF APPEAL.]

In re BRINDLEY.
Ex parte TAYLOR, SONS & CO.

Bankruptcy—Act of Bankruptcy—Assignment—Clause empowering Trustee or Committee of Inspection to give Preference to any Non-assenting Creditor—Validity of Deed—Petitioning Creditor—Claim for Preference under Deed—Trading with Trustee—Trustee's Title—Acquiescence—Estoppel—Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *s.* 4, *sub-s.* 1 (*h*).

An act of bankruptcy committed by a debtor, under s. 4, sub-s. 1 (h), by the execution of an assignment for the benefit of his creditors, cannot be made the basis of a bankruptcy petition by a non-assenting creditor, if that creditor has done any act or acts amounting to an acquiescence in the deed or to a recognition of the trustee's title therein; as, for example, by supplying goods to and receiving payment therefor from the "trustee" as such, or by endeavouring to take advantage of a clause in the deed empowering the trustee of the deed in his own discretion or at the direction of the committee of inspection "to pay in full, or otherwise than by dividends under these presents, any creditor or creditors who shall decline to execute or assent to these presents."

Ex parte Alsop, (1859) 1 De G. F. & J. 289, and *Ex parte Stray*, (1867) L. R. 2 Ch. 374, followed.

Per Cozens-Hardy L.J.: A clause such as that above mentioned, in a creditor's deed, is improper as providing a means of bribing a creditor to assent to the deed, and may go far towards invalidating the deed altogether.

Appeal from a receiving order made by a Divisional Court, sitting in bankruptcy, on an appeal from the refusal of the registrar of the county court of Staffordshire, holden at Hanley, to make the order.

On September 8, 1905, John William Brindley, a timber merchant at Burslem, under the pressure of actions brought against him by some of his larger creditors, including a firm of Charles Taylor, Sons & Co., timber merchants at Bootle, executed an assignment to a trustee for the benefit of his creditors in the usual form, except that at the end of the deed was the following clause: "And it is hereby lastly agreed and declared that if the trustee in his own discretion shall think it expedient to do so, or if a committee of inspection shall be appointed by the creditors,

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then, if a majority of such committee shall so direct, it shall be lawful for the trustee to pay in full or otherwise than by dividends under these presents, any creditor or creditors who shall decline to execute or assent to these presents." The deed was duly registered.

On the preceding day, September 7, a circular had been sent out by Messrs. Alcock & Abberley, the debtor's solicitors, calling a meeting of his creditors for September 13, and inviting statements of their debts. Accordingly Messrs. Taylor, Sons & Co., on September 11, 1905, wrote to Messrs. Alcock & Abberley a letter enclosing an account which shewed a total indebtedness to them of 694*l.*, and stating that they held a dishonoured bill of the debtor's for 132*l.* 15*s.* 10*d.* which had fallen due on July 14, and that he was further indebted to them in a sum of 100*l.* 15*s.* 1*d.* for goods supplied to him, and complaining that, as to these two items, he had failed to fulfil certain specific promises of payment. The letter proceeded: "Both these items are in the hands of our solicitors, Messrs. J. M. Quiggin & Son, and we will not consider any arrangement other than payment concerning them; but for the other items in the account we will be prepared to consider anything that is in the best interests of your client and that may appear acceptable to the general body of creditors. We will not be present at the meeting and our solicitors have instructions to press the actions we have in hand."

A lengthy correspondence then passed between the debtor and Messrs. Taylor with reference to the two debts of 132*l.* 15*s.* 10*d.* and 100*l.* 15*s.* 1*d.*, the debtor appealing to Messrs. Taylor to assent to the deed of assignment and not to drive him into bankruptcy, and Messrs. Taylor insisting upon payment of those two debts in full.

On September 13, while that correspondence was proceeding, the creditors' meeting was held, at which a statement of the debtor's affairs was submitted, and then resolutions were passed, with only one dissentient, adopting the deed of assignment and appointing a committee of inspection, also instructing the trustee to act under the direction of the committee in the continuance of the business and the realization of the estate. Messrs. Taylor

were not present at the meeting. On the following day notice of those resolutions was sent out to all the creditors, including Messrs. Taylor.

Ultimately, on September 25, Messrs. Taylor presented a bankruptcy petition against the debtor, based on the dishonoured bill of exchange for 132*l.* 15*s.* 10*d.*, and also on the ground that the debtor had committed an act of bankruptcy in having executed the assignment of September 8, 1905.

Subsequently on the same day they wrote to one of the debtor's friends—who had previously called upon them and had endeavoured to induce them to assent to the deed—pointing out that they, Messrs. Taylor, had been that day informed by their solicitors "that there is a clause in the assignment permitting payment in full of debts of all those who will not sign the deed, and in such circumstances we do not see that there can be any difficulty in attaining the object you and Mr. E. had in view when you were good enough to pay us the visit on the debtor's behalf; and probably, if this clause has not previously been brought to your notice, you may find in it a solution of the problem." That letter was handed to Messrs. Alcock & Abberley, who were acting as solicitors to the committee of inspection, and they, on September 26, wrote to Messrs. Taylor that the clause, though frequently inserted in deeds of that character, was not intended to apply to a case like the present, and that they could not advise the committee to assent to the proposition. In reply, Messrs. Taylor refused to modify their original requirements, and expressed their intention of pressing on the bankruptcy proceedings.

In opposition to the petition, the debtor filed an affidavit setting out the correspondence between himself and the petitioners, and stating that the resolution passed at the creditors' meeting adopting the deed had been passed by a majority of his creditors; that none of the creditors except the petitioners were desirous of a bankruptcy liquidation; that the petitioners had made it a condition for their coming in under the deed that he should make them a preferential payment in full; and that from the correspondence he believed that they did not really wish for a receiving order to be

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made against him, but were using this as a lever by which they could obtain an advantage over the general body of his creditors.

After the creditors' meeting the trustee proceeded to carry on the debtor's business in order to preserve it as a going concern, and for that purpose gave orders for goods to several of the creditors. On September 26 he wrote Messrs. Taylor a letter headed "In re Brindley," giving them an order for a specified quantity of timber, "which is required in connection with the realization of this estate," the letter being signed by him as "Trustee." Thereupon, on September 28, Messrs. Taylor supplied the timber to the trustee, invoicing it to him as the "Trustee of J. W. Brindley," and the trustee then sent to Messrs. Taylor a cheque for the goods, which was received and cashed by them in due course.

On September 27, in reply to a further written appeal from the debtor, Messrs. Taylor wrote that they declined to take any composition or agree to any assignment unless they had the two debts already referred to paid in full.

The petition came on for hearing before the registrar of the county court at Hanley on October 6, 1905, when he refused to make a receiving order upon the grounds that the correspondence shewed that the petitioning creditors had made every attempt and used every exertion to obtain an undue preference as regarded a portion of their debt, so that there was "sufficient cause," within s. 7, sub-s. 3, of the Bankruptcy Act, 1883, for not making a receiving order, and further that they had "acquiesced" in the assignment, within the meaning of the authorities, by continuing to trade with the debtor's trustee.

From that decision the petitioning creditors appealed to the Divisional Court, sitting in bankruptcy, consisting of Bigham and Walton JJ., who on December 4, 1905, delivered a considered judgment, in which they dealt mainly with the question whether, upon the facts and correspondence, the petitioning creditors had, by threats of bankruptcy, endeavoured to induce the debtor to give them a secret preference over his other creditors whilst joining with them apparently on equal terms in the deed of arrangement,

so as to bring the case within *Re Shaw* (1), and *Re A Debtor* (*Goldberg*). (2) Upon that point their Lordships held that there was no evidence that the petitioning creditors had been attempting to take any undue or improper or inequitable advantage of the other creditors. The second point, as to acquiescence in the assignment, their Lordships disposed of very shortly, dealing only with the circumstance of the supply of timber by the petitioning creditors to the trustee; and they held that that did not amount to acquiescence, and that the petitioning creditors did not, in fact, thereby acquiesce. They accordingly allowed the appeal and made a receiving order.

The debtor then appealed to the Court of Appeal.

The appeal was heard on December 15, 1905.

The case requires a report upon the second point only, namely, whether, in the circumstances and in law, there had been such an acquiescence by the petitioning creditors in the deed of assignment as to estop them from making the execution of that deed by the debtor the basis of their bankruptcy petition.

Reed, *K.C.*, and *B. C. Brough*, for the debtor. The main question is whether there has been, upon the facts, such an acquiescence by the petitioning creditors in the assignment as precludes them from making the execution of the deed by the debtor the basis of their petition as being an act of bankruptcy. The facts which we say are sufficient to constitute acquiescence are, first, that the petitioning creditors, after the assignment, supplied timber to and accepted payment from the "trustee" as such; and, secondly, that they proposed to take advantage of the very unusual and questionable clause in the deed, enabling the trustee or the committee of inspection to give any creditor not assenting to the deed a preference. There is thus such an acquiescence as creates an estoppel as against the petitioning creditors: *In re Hawley* (3); *In re Woodroff* (4); *Ex parte Stray* (5), where Cairns L.J. thus sums up the law: "A creditor who is a party or privy to a deed

(1) (1901) 83 L. T. 754.

(2) (1904) 91 L. T. 664; 21 Times L. R. 139.

(3) (1897) 4 Manson, 41; 76 L. T. 501.

(4) (1897) 4 Manson, 46; 76 L. T. 502.

(5) L. R. 2 Ch. 374, 378.

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of the description mentioned in the statute, or who has acted in any way which would be equivalent to an assent, recognition, or approval of the deed, cannot allege that the execution of the deed is an act of bankruptcy." This point does not appear to have been fully considered by the Divisional Court, whose judgment dealt almost exclusively with the first point, the threat of bankruptcy, and dismissed the second point very shortly and without discussing the authorities. *Ex parte Alsop* (1) is a still earlier authority that acts amounting to acquiescence in a deed of assignment for the benefit of creditors are a bar to a bankruptcy petition based on the execution of such a deed.

F. E. Smith, for the petitioning creditors. The question whether there has been acquiescence must depend entirely upon the particular facts; and the cases cited, where the facts were different from those here, cannot be properly applied to the present case. In *Ex parte Stray* (2) acquiescence was inferred almost entirely from two facts, one being that the petitioning creditor was himself present at the creditors' meeting and assented to the assignment, and the other being that he took a benefit under the assignment through the debtor's property being thereby protected from execution. Neither of those elements are present here. In *Ex parte Alsop* (1) the circumstances supporting acquiescence were very strong, for the creditor had expressed an opinion in favour of a sale taking place under the trusts of the assignment. *In re Hawley* (3) depended upon the whole conduct of the creditor, which the Court held, after some doubt, to be sufficient to raise an estoppel. There the creditor was told all that had taken place at the meeting. In *In re Woodroff* (4) the creditor accepted repeated orders for goods; he also received information as to the progress of the liquidation and expressed no dissent. So here, if the petitioning creditors had attended the creditors' meeting, and if they had been told of the trustee's proceedings under the deed and had continued to do business with him, there would, no doubt, have been an estoppel. But they absolutely refused either

(1) 1 De G. F. & J. 289.
(2) L. R. 2 Ch. 374.
(3) 4 Manson, 41, 45; 76 L. T. 501.
(4) 4 Manson, 46; 76 L. T. 502.

to attend the meeting or to assent to or sign this deed unless a specified portion of their debt were paid in full. That they were not precluded by the authorities from doing. A statement that "We will acquiesce and bind ourselves if you, the debtor, do so and so" is not acquiescence: it only indicates a willingness to acquiesce if certain conditions are complied with. After the execution of a deed the evidence of acquiescence requires to be much stronger than where the acquiescence has been before the execution: *In re Michael.* (1) The mere fact of trading with the trustee is not of itself conclusive evidence of acquiescence in the assignment; if it were, it would have been unnecessary, in *In re Woodroff* (2), for the Court, as it did, to go into all the circumstances and to see the witnesses. In fact, trading with the trustee is only some evidence—not conclusive evidence—of acquiescence. The language used by the petitioning creditors in the correspondence here is so clear and unambiguous as to prevent the operation of the law of estoppel. The doctrine laid down by Cairns L.J. in *Ex parte Stray* (3) has no application to the circumstances here: it only relates to the particular fact proved in that case, that the creditor had actual knowledge of the whole circumstances and of the deed of assignment. As to the final clause in the assignment, it is not, under the present bankruptcy law, a fraudulent proceeding for a particular creditor, with the knowledge of the other creditors, to say, "Pay me in full and I will assent to the deed," or, "Unless you, the debtor, pay me in full I will make you bankrupt."

VAUGHAN WILLIAMS L.J. I will make a very short statement of the law which, in my opinion, is conclusive of this case. Here we have a deed of assignment by a debtor for the benefit of his creditors. That deed is, by law, an act of bankruptcy, and in the old days it was called a "fraudulent" assignment or conveyance, but in modern times it has not been thought necessary to describe in terms the assignment constituting the act of bankruptcy as fraudulent. Such an assignment is of necessity fraudulent as against creditors, and in *In re Wood* (4) we find a

(1) (1891) 8 Morrell, 305, 310.
(2) 4 Manson, 46; 76 L. T. 502.
(3) L. R. 2 Ch. 374, 378.
(4) (1872) L. R. 7 Ch. 302, 306.

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very plain statement by Mellish L.J. that the omission of the word "fraudulent" does not make the slightest difference. The truth of the matter is that it was not necessary, in the earlier Acts of Parliament, to use the word "fraudulent," or any word of that sort, because an assignment of his property by an insolvent debtor must necessarily be a fraud on creditors. Now, there being such a deed of assignment in the present case, the sole question is whether, as against Messrs. Taylor, the petitioning creditors, that deed can be regarded as void and as a good foundation for the petition.

With regard to the first point dealt with by the Divisional Court, I do not intend to say anything, for it is not necessary that I should say that there was any conscious intent on the part of Messrs. Taylor to obtain a preference over the other creditors, but I see no reason for dissenting from the conclusion at which the Court arrived.

I have, however, to deal with another point, namely, whether there has been an estoppel as against the petitioning creditors based on acquiescence. It is said that there is an estoppel, and one based upon a proposition so plain that no one who recognized that this proposition had to be dealt with would dispute the result for one moment. If a man treats a deed as being an honest deed which cannot be impeached, and, so treating it, takes an advantage under it, it is impossible that he should ever be allowed afterwards to say that a person taking under that deed has no title. That is the principle upon which all the cases proceed, beginning with *Ex parte Alsop* (1), and going on with *Ex parte Stray.* (2) Now, in the present case, what was it that Messrs. Taylor did which amounted to a recognition that this deed conferred a good title upon the trustee so as to preclude them from saying that the deed was a fraud on creditors? In the first place, they accepted an order from the trustee under that deed for a supply of timber, and received payment by a cheque from him; in doing that they clearly recognized the title of the trustee. They had no right to accept that money if their intention was afterwards to dispute the trustee's title. Then their subsequent position was by no means improved by the

(1) 1 De G. F. & J. 289. (2) L. R. 2 Ch. 374.

circumstance that they were creditors who, up to that time, had said they would not assent to the deed unless they received an advantage over the other creditors.

Then Messrs. Taylor's next act of acquiescence was this: Having become fully aware of the circumstances with regard to their position—that is to say, having become aware that there had been an act of bankruptcy and that this deed had been accepted on the part of the majority of the creditors—Messrs. Taylor's position was this, that they could not properly receive payment of the debt they demanded unless the deed was a good deed; because it is quite plain that, there having been an act of bankruptcy on September 8, 1905, any payment they might receive after that date was a payment they ought not to receive, and especially where there had been another act of bankruptcy, namely, the calling together of the creditors as the result of a notice that the debtor was unable to pay his debts. That this was an act of bankruptcy is clear from s. 4, sub-s. 1 (*h*) of the Bankruptcy Act, 1883, which is in these words: "A debtor commits an act of bankruptcy . . . . if the debtor gives notice to any of his creditors that he has suspended, or that he is about to suspend, payment of his debts." In this case especially, where an act of bankruptcy had been committed by the execution of an assignment, every creditor ought to have known, apart from the fact that there had been an antecedent act of bankruptcy, and particularly from the nature of that act of bankruptcy, that he had no right to obtain any part of his debt from the debtor, not only because the title of the trustee related back to the earlier act of bankruptcy, but also because the debtor having given notice of suspense of payment he could not, after he had called his creditors together, make an honest payment to one of those creditors.

Now, what is it that has happened? There was one way in which Messrs. Taylor thought it was possible they could get the money they claimed and keep it, and that is, under the clause at the end of the deed which empowers the trustee or the committee of inspection to give a preference to and pay any creditor who does not assent to the deed. In my judgment, the very fact that Messrs. Taylor, the non-assenting creditors, by their letter of

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September 25, 1905, made an attempt to secure this money for themselves by means of that clause was itself an acquiescence which estopped them from saying afterwards that the deed was not binding. Accordingly we have two recognitions of the deed by Messrs. Taylor, one in accepting payment for the timber supplied by them to the trustee, and the other in their attempting to obtain, under the last clause of the deed, payment of a sum of money which they could obtain effectively only under the deed.

Now I consider that, in the circumstances, it is not at all necessary for me to go through all the cases that have been cited to us, but there are two of them to which I may refer. One is *Ex parte Alsop* (1), and there I need only read the following passage from the judgment of Turner L.J. (2): "The only remaining question is, whether the petitioning creditor has so far assented to this deed as to have lost the right of availing himself of it as an act of bankruptcy. Upon the result of the evidence, I have come to the conclusion that the petitioner must be considered as having so far assented to the deed as to have precluded himself, notwithstanding his refusal to sign it, from disputing it. I am wholly unable to account for his letter of November 8, to the trustee, upon the assumption that at the time he was not an assenting party to the deed, as a deed to be executed by the requisite number of creditors." The letter of November 8 was simply a letter in which the petitioning creditor asked that he might be supplied with the particulars of a sale which was about to take place of part of the property subject to the assignment, undoubtedly that he might have a chance of attending the sale about to be made by the trustee under the trusts of the deed.

Then in *Ex parte Stray* (3) one finds in the judgment of Cairns L.J. the following passage (4), which has been referred to several times to-day: "I have no doubt at all that the facts I have thus stated bring the case entirely within the principle of the cases to which I have referred, and I cannot look on Mr. Goody otherwise than as a person who assented to the

(1) 1 De G. F. & J. 289.
(2) Id. at p. 298.
(3) L. R. 2 Ch. 374.
(4) Id. at p. 381.

execution of this deed, was taking advantage of the deed for the purpose of shielding the estate for a certain length of time, and was willing, if certain other arrangements such as were contemplated could have been made, to take still further advantage from the deed." Then that is followed by a passage shewing that Cairns L.J. did not for one moment intend to say that Goody must be taken to have assented to being bound by the deed, but only that he had by his conduct put himself in such a position that he could not be heard to say that the deed on which he proposed to base his bankruptcy petition was a fraudulent deed. And I have only to add this, that it is pure estoppel which prevents the would-be petitioning creditors here from resiling from the deed of assignment. It is not a case of what they said, but what they did—whether they did not in fact recognize the title of the trustee under this deed. They have no right to say that the trustee had no title when at the very same moment they were recognizing the title of the trustee. Even though they may in words have been disputing his title all along, they cannot get rid of the effect of their own acts. They are in fact bound by those acts.

The result, in my opinion, is that the proper course is to allow this appeal, and to say that the receiving order ought not to have been made, because the petitioning creditors by their acts so recognized the title of the trustee under the assignment that they could not afterwards be heard to say that the deed was a void deed.

The appeal must be allowed with costs.

STIRLING L.J. I am of the same opinion, and will state my reasons very shortly. On September 8, 1905, the debtor executed a deed of assignment for the benefit of his creditors. On September 26 the trustee under that deed wrote to the petitioning creditors saying that he would be obliged by their supplying him with certain quantities of timber which, he said, were required in connection with the realization of the debtor's estate. Upon that the petitioning creditors, on September 28, invoiced a certain amount of timber to the trustee of the creditors' deed, the invoice describing him as such; and then

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the trustee sends his cheque to the petitioning creditors for the goods, which cheque the petitioning creditors cash, putting the money in their own pockets. Now they present a petition based upon the execution by the debtor of this deed of assignment being an act of bankruptcy, and they say that this deed is void as against themselves. The answer is, "That is impossible: you, the petitioning creditors, have dealt with the trustee acting in the administration of the debtor's estate, to which, according to your view, the trustee has no right at all." It was no answer to that to say, "We do not assent to the deed." By this act the petitioning creditors treated the deed as a good deed, and they cannot both approbate and reprobate, treating the deed as good for one purpose and bad for another.

The case, in my opinion, falls entirely within *Ex parte Alsop* (1), and *Ex parte Stray* (2). I do not know that we are really differing from what was decided in the Divisional Court, for, looking at the judgment of that Court, I do not think that this view of the case was presented to that Court. For these reasons, and for the other reasons stated by the Lord Justice, I think this appeal ought to be allowed.

COZENS-HARDY L.J. I am of the same opinion, and for the same reasons. There is only one point upon which I wish to make an observation. The last clause of the deed of assignment is as follows: [The Lord Justice read it, and continued:—] In plain English, this clause enables the trustee or the committee of inspection to directly offer a bribe to any creditor to induce him to assent to the deed. It is, in my opinion, a most improper clause, and would go far to invalidate the deed containing it, though the deed might be otherwise free from objection.

Appeal allowed.

Solicitors: *M. A. Orgill, for Alcock & Abberley, Burslem; Norris, Allens & Chapman, for J. M. Quiggin & Co., Liverpool.*

(1) 1 De G F. & J. 289. (2) L. R. 2 Ch. 374.

G. I. F. C.

[IN THE COURT OF APPEAL.]

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Dec. 15, 18.

In re MILLS.

Ex parte MILLS.

[No. 976 of 1905.]

Bankruptcy—Receiving Order—Petitioning Creditor—Locus Standi—Assignment for Benefit of Creditors—Petitioning Creditor disentitled to use Assignment as act of bankruptcy—Petition founded on independent act of bankruptcy.

A creditor, who has so acted with reference to an assignment for the benefit of creditors executed by his debtor, that he cannot be allowed to found a bankruptcy petition against the debtor on the deed as an act of bankruptcy, is yet, if he is not bound by the deed, entitled to present a bankruptcy petition against the debtor founded on an independent act of bankruptcy, though the result may be that the deed will be avoided as against the trustee in the debtor's bankruptcy.

Dictum of Lord Cairns L.J. in *Ex parte Stray*, (1867) L. R. 2 Ch. at p. 381, adopted.

Dictum of Vaughan Williams J. in *In re Woodroff*, (1897) 4 Mans. at p. 49, approved.

Appeal from a receiving order made by one of the registrars in bankruptcy against A. W. Mills.

The receiving order was made upon the petition of L. C. Baines, a judgment creditor, the act of bankruptcy alleged being the failure of the debtor to comply with a bankruptcy notice requiring payment of the judgment debt. The bankruptcy notice was served on July 28, 1905, and the petition was presented on August 5. The receiving order was made on November 16.

On July 21, 1905, a meeting of the creditors of the debtor was held, and was adjourned to July 25. On July 25 a resolution was duly passed by the creditors present that the debtor should execute a deed assigning all his property to a trustee for the benefit of his creditors. Eight creditors voted for the resolution, and none voted against it. Baines was present at the meeting, but he did not vote one way or the other, though he expressly stated that he would not assent to the deed.

After this resolution had been carried, it was proposed that an accountant nominated on behalf of the debtor by his

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solicitor should be appointed trustee of the deed. Baines then suggested that a Mr. Berry would be a more fit person to act as trustee than a nominee of the debtor, and a resolution was passed appointing Berry trustee. Baines, however, did not vote upon this resolution. There was some dispute as to what took place upon this occasion. Two witnesses said that Baines "proposed" Berry as trustee and voted for him, but Baines denied this. He said that on the debtor's solicitor proposing a nominee of the debtor as trustee "I shouted out that under any circumstances I did not consider it proper that a nominee of the debtor should be appointed. I had previously been advised by my solicitor that in case of bankruptcy Mr. Berry should be appointed trustee. In the discussion that ensued, I therefore mentioned Mr. Berry's name as a more fit and proper person than the debtor's nominee. I did so entirely as a matter of opinion and advice on my part to the creditors, who had already voted for the deed of assignment, and they accepted such advice and appointed him. Acting upon my solicitor's advice I did not put forward Mr. Berry's name as a proposition or as mover of a resolution for his appointment, nor did I vote thereon. . . . I requested the chairman to record the fact that I did not vote upon either resolution." This evidence was confirmed by three other creditors who were present at the meeting.

The deed of assignment was executed on July 27.

The registrar was of opinion that the petitioning creditor was not estopped by what he had done at the meeting from presenting the bankruptcy petition. So to hold would be to go much further than *In re Shaw* (1) or *In re A Debtor*. (2) If a creditor could not open his mouth at such a meeting without being held to assent to the resolutions, no creditor could venture to attend one. What was the object of such meetings if there was to be no discussion?

The debtor appealed.

Ernest Pollock, K.C., and *Hansell*, for the debtor. It is submitted that by his conduct the petitioning creditor has

(1) (1901) 49 W. R. 264; 83 L. T. 754. (2) (1905) 53 W. R. 223.

precluded himself from presenting a bankruptcy petition against the debtor. It is clear from the decided cases that he could not make use of the execution of the deed as an act of bankruptcy. But it is submitted that the principle of those decisions goes further and governs the present case. Baines has so far assented to the deed as to take advantage for a time of the protection it gave to the debtor's assets, and he is not entitled now to proceed against the debtor in bankruptcy, the result of which would be to set aside the deed as fraudulent: *Ex parte Alsop* (1); *Ex parte Stray* (2); *In re Woodroff.* (3) In *Ex parte Mendelsohn* (4), Vaughan Williams L.J. said (at p. 222): "It was said that they" (the petitioning creditors) "were in the position of a creditor who has assented to a deed—either a composition deed or a deed providing for the distribution of the debtor's property—and who is thereby prevented from afterwards doing any act inconsistent with his own assent."

The evidence shews that the petitioning creditor expressed his wish that Berry should be appointed trustee of the deed in order that the provisions of the deed might be effectually carried out. The deed would have been a good defence to an action by the petitioning creditor against the debtor. Why should it not be an equally good defence to a proceeding in bankruptcy within three months?

McCall, K.C., and *F. Cooper Willis*, for the petitioning creditor, were not called upon.

VAUGHAN WILLIAMS L.J. I will deal with this case upon the basis that the petitioning creditor did something more than shout out at the meeting that a nominee of the debtor was not a proper person to be appointed trustee of the deed—that he went on to offer his advice that Mr. Berry was a proper person to appoint, and that his advice was acted on by the creditors. It may be that the effect of that conduct was to make the petitioning creditor a privy to the execution of the deed in this sense—that he could not afterwards use the execution of the deed as an act of bankruptcy upon which to found a bankruptcy petition

(1) (1859) 1 D. F. & J. 289, 298.
(2) L. R. 2 Ch. 374, 381.
(3) 4 Mans. 46, 49.
(4) [1903] 1 K. B. 216.

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against the debtor. But one thing, to my mind, is plain, viz., that the petitioning creditor did not so act as to be in any way bound by the deed, and if he is not bound by the deed there is nothing to prevent him from recovering any debt due to him in any way that he legally can, and therefore, in my judgment, there was nothing to prevent him from presenting a bankruptcy petition founded upon some other independent act of bankruptcy. I expressed an opinion to that effect in *In re Woodroff*. (1) That observation of mine was not necessary to the decision of that case, but I think it was well founded, and I am prepared to act upon it now. I am confirmed in this view when I look at the judgment of Lord Cairns L.J. in *Ex parte Stray* (2), in which he said (at p. 381) this: "I have no doubt at all that the facts I have thus stated bring the case entirely within the principle of the cases to which I have referred, and I cannot look on Mr. Goody otherwise than as a person who assented to the execution of this deed, was taking advantage of the deed for the purpose of shielding the estate for a certain length of time, and was willing, if certain other arrangements such as were contemplated could have been made, to take still further advantage from the deed. I again repeat that I think nothing passed actually to bind Mr. Goody entirely to abide by the deed and to come in under the deed as a person who would take no other proceedings for the recovery of his debt; but what I think Mr. Goody is estopped from saying is, that this deed, at the moment it was executed under the circumstances I have mentioned, was a fraudulent deed, and one of which he can complain for the purpose of alleging an act of bankruptcy committed by the debtor."

In my opinion that observation of mine in *In re Woodroff* (1) is entirely supported by the passage in the judgment of Lord Cairns L.J. which I have just read.

STIRLING L.J. I am of the same opinion. I think that by his conduct this petitioning creditor placed himself in a position which prevented him from alleging that the assignment for the

(1) 4 Mans. at p. 49.

(2) L. R. 2 Ch. 374.

benefit of the creditors was an act of bankruptcy. But it is clear from what was said by Lord Cairns in *Ex parte Stray* (1), that a creditor may be precluded by his conduct from alleging that such a deed is an act of bankruptcy and still not be bound by the deed.

In the present case it is clear from the evidence that the petitioning creditor distinctly refused to be bound by the deed; but for the purpose of this bankruptcy petition he is not obliged to allege the execution of the deed as the act of bankruptcy upon which he relies. He relies upon another and a different act of bankruptcy. It may be that if the debtor is adjudged bankrupt on this petition the trustee in the bankruptcy will be entitled to say that the bankruptcy relates back to and avoids this deed, because the trustee will not be bound by the conduct of the petitioning creditor. But, as regards the petitioning creditor himself, he is not alleging the deed as an act of bankruptcy or insisting that it was a fraudulent deed. In my opinion the appeal fails.

COZENS-HARDY L.J. I agree.

Appeal dismissed.

Solicitors: *Culross & Holt; Goldberg, Barrett & Newall.*

(1) L. R. 2 Ch. at p. 381.

W. L. C.

1905
Nov. 7.

GREEN AND OTHERS *v.* WANKLYN.

Parliament—Franchise—Registration—Borough Vote—Description of Occupier—Omission of One of Two Christian Names—Power to Amend—Parliamentary and Municipal Registration Act, 1878 (41 & 42 *Vict. c.* 26), *ss.* 24, 28.

Where objection was duly taken before a revising barrister to the name of a certain voter being retained on division 1 of the list of voters for a borough, and it was proved that the second Christian name of the voter had been omitted on the list, but he made no declaration of misdescription as provided in s. 24 of the Parliamentary and Municipal Registration Act, 1878 :—

Held, that the revising barrister had power under s. 28, sub-s. 1, to amend the mistake and insert the voter's full name on the list.

CASE stated by a revising barrister.

At a court held before a barrister duly appointed to revise the lists of voters for the borough of Colchester, at Colchester, on September 11, 1905, objection was duly made to the name of Herbert Green being retained on division 1 of the list of voters for the said borough in respect of a dwelling-house, No. 20, St. Peter's Street.

The facts were as follows :—

(1.) The name of the occupier of the said house appeared in the list as Herbert Green, and it was proved or admitted that the correct name of the occupier of the said house was Herbert Ambrose Green.

(2.) In a considerable number of cases the Christian names of voters were omitted from or misstated in the lists, and in many cases the said voters had made either new claims or declarations in order to correct such omissions or misstatements.

(3.) Herbert Ambrose Green had not made a new claim or a declaration.

(4.) I was asked to treat the omission of the second Christian name as a mistake in the list within the meaning of s. 28, sub-s. 1, of the Parliamentary and Municipal Registration Act, 1878, and to correct it.

(5.) I held that an omission was not a mistake which I was bound to correct after objection had been made, and I declined

to make the correction and struck the name of Herbert Green out of the list.

(6.) The names of five other persons on division 1 of the list, of two persons on division 2 of the list, and of two persons on division 3 of the list, as set out in the schedule hereto, were duly objected to under similar circumstances, and were struck out of the list.

(7.) Due notice of appeal from my decision was given in every case, and I directed the appeals to be consolidated.

If the Court should be of opinion that my decision was wrong and that the correction should have been made, the register is to be amended by the insertion of the name of Herbert Ambrose Green, with the qualification dwelling-house, 20, St. Peter's Street, in division 1 of the list, and by the insertion of the names of the other nine persons set out in the schedule in divisions 1, 2, and 3 of the list respectively, with the qualifications set out in the said schedule.

C. E. Jones, for the appellants. The revising barrister was wrong. It was his duty under s. 28, sub-s. 1, of the Parliamentary and Municipal Registration Act, 1878 (41 & 42 Vict. c. 26), to correct the mistake in the list. [He was stopped.]

E. Lewis Thomas, for the respondent. The revising barrister was right. There was no evidence before him that the Herbert Green on the register and Herbert Ambrose Green were the same persons. If Herbert Ambrose Green was not correctly described, his proper course was to make a declaration as to the misdescription, as provided in s. 24 of the Parliamentary and Municipal Registration Act, 1878, and in default of such a declaration the revising barrister had no power to alter the list. The form of the declaration is given by the Registration Order, 1895, Form M, and it is clearly intended to meet such a case as this.

[He referred to *Moorhouse* v. *Linney* (1), *Foskett* v. *Kaufmann* (2), *Plant* v. *Potts* (3), *Soutter* v. *Roderick* (*Barker's Case*) (4), *Kitchen* v. *Johnson* (5), *Luckett* v. *Knowles*. (6)

(1) (1885) 15 Q. B. D. 273.
(2) (1885) 16 Q. B. D. 279.
(3) [1891] 1 Q. B. 256.
(4) (1895) Smith's Registration Cases, 36.
(5) [1899] 1 Q. B. 95.
(6) (1846) 2 C. B. 187.

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It was always allowable to correct an error in the description of the place of abode or of the qualification, but there is no case which allows an alteration in the name of the person without a declaration by him under s. 24.

LORD ALVERSTONE C.J. In this case, if we had come to the conclusion that the meaning of s. 24 is that a declaration under that section is the only means whereby a claimant can set right a mistake of this kind unless he comes before the Court himself, different considerations would have arisen. I quite agree that the fact that s. 28 provides in general for mistakes being corrected by the revising barrister, and that s. 24 includes specifically the case of a person making a declaration because his name is wrongly stated, affords some ground for saying that the omission of part of a name was not a mistake within s. 28. But in my judgment that would be too narrow a view. We have to remember here that an objection was taken to this person, and that he had been served with notice that his name had been objected to, and that, therefore, it is not a question of something which is done by the revising barrister of his own motion or on some intimation made to him. It was not a case of someone who happened to be in Court remarking, "That man's name is Ambrose." That is not the way in which the question arose. Formal notice of objection was given, and it was proved or admitted that the correct name of the occupier of the house was Herbert Ambrose Green. That being so, I think that it is another illustration of the same kind as that which was before the Court in *Barker's Case*. (1) Here there was no dispute as to the real occupier, but evidence before the revising barrister that the claimant's second Christian name, "Ambrose," had not been put in the list. That the revising barrister meant to raise that point is, to my mind, clear, because he has treated it as one of ten cases where similar omissions occurred. Therefore it cannot be suggested that he acted as he did, because he was not satisfied that the occupier was the right man, or that there was not sufficient evidence that the right person had come forward and claimed to have his name put right. Under these circumstances

(1) Smith's Registration Cases, 36.

it seems to me we ought not to cut down the power of the revising barrister to correct what is clearly a mistake in the ordinary sense of the word, because there is another section which enables the claimant, if he thinks fit, to get the mistake corrected by another proceeding. Therefore, in my opinion, we are following out the line laid down in *Barker's Case*. (1) It seems to me also most excellent good sense, and I think the revising barrister had power to make this correction and ought to have made it. The appeal must be allowed, and Herbert Ambrose Green's name will appear on the list, and the other names will follow in the same way.

WILLS J. I think s. 24 applies to cases in some of which the corrections to be made may be very important and may amount to a new claim, while in others the corrections are trivial, and the mistakes to be corrected are simply of the ordinary class of slips, clerical errors, and so on. If the person whose name is objected to deems it to be of sufficient importance or cares enough about it to take steps himself to have the error corrected, whatever it may be, then it seems perfectly reasonable that he should not simply give notice "This is a mistake," but that he should, if he does not want to attend himself, which he has power to do under the Act of Parliament, send a formal declaration of what his qualification and name is, and what correction he desires to have made. If he sets the law in motion, so to speak, in that way, he must make the declaration in the form provided. That certainly, to my mind, does not deprive the revising barrister of the power given him under s. 28 to correct any mistake, and of course any mistake means anything which is either proved or admitted to be a mere slip and nothing else—which cannot be complicated with the suggestion that it might be the cover for a fraudulent claim. I think the revising barrister took too narrow a view of his powers, and I agree, therefore, that this appeal should be allowed.

DARLING J. I agree. I think it is plain from the case stated that the real occupier was Herbert Ambrose Green, who had

(1) Smith's Registration Cases, 36.

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Darling J.

been described in the list as "Herbert Green." The amendment desired was merely, therefore, to rectify an omission of part of his name. It was not a case where there was any possibility of substituting another person for him.

It is no more, to my mind, a change of name than the altering of the spelling of the name of the real occupier would have been.

Appeal allowed.

Solicitors for the appellant: *Doyle, Devonshire & Co.*
Solicitors for the respondent: *Milner & Bickford.*

A. P. P. K.

1905
Dec. 20.

LOWERY, APPELLANT; HALLARD, RESPONDENT.

Adulteration—Sample—Purchase for Analysis—Mode of dividing Sample—Sale of Food and Drugs Act, 1875 (38 & 39 *Vict. c.* 63), *s.* 14.

Where an article of food is purchased for the purpose of analysis under s. 14 of the Sale of Food and Drugs Act, 1875, each of the three parts, into which the article is required by that section to be divided, must be sufficient to admit of a proper analysis being made of that part.

CASE stated by two justices of Cheshire under the Summary Jurisdiction Acts.

An information was preferred by the respondent against the appellant, under the Sale of Food and Drugs Acts, 1875 to 1899, for having sold to the respondent and to his prejudice brandy which was not of the nature, substance and quality demanded by the purchaser.

At the hearing, the following facts were admitted or proved: The respondent, an inspector of weights and measures, asked for and purchased from the appellant at her licensed premises half a pint of brandy; he then divided the sample into three parts, one containing five ounces, one containing about three ounces, and one containing about two but less than two and a half ounces; and he complied with the other requirements of the Sale of Food and Drugs Act, 1875. (1) The respondent submitted the part

(1) By s. 14 of the Sale of Food and Drugs Act, 1875 (38 & 39 Vict. c. 63), "The person purchasing any article with the intention of submitting the same to analysis shall, after the purchase shall have been

containing five ounces to the public analyst; he gave the part containing less than two and a half ounces to the appellant, and he retained the part containing about three ounces for future comparison. The public analyst gave his certificate, from which it appeared that the brandy was adulterated. It appeared from the uncontradicted evidence of the public analyst, and of an analyst called on behalf of the appellant, as set out in the case, that it would not be possible to get a complete or satisfactory analysis of a sample of brandy containing only two and a half or three ounces. On behalf of the appellant it was contended, among other objections, that, inasmuch as the sample purchased from her had been divided into three unequal parts as above set out, the provisions of s. 14 of the Act had not been complied with. The justices held that there had been a sufficient compliance in law with the requirements of the section, and they convicted the appellant.

The question (among others) for the opinion of the Court was whether the conviction was wrong upon the ground that the sample of brandy was divided into three unequal parts as above stated.

Pickford, K.C. (*Cuthbert Smith* with him), for the appellant. This conviction was wrong because the requirements of s. 14 of the Sale of Food and Drugs Act, 1875, as to the division of the sample into three parts, were not properly complied with. It is a condition precedent to the institution of a prosecution under the Act that the sample should be properly divided into three parts. The provisions of s. 14 must be strictly complied with: *Barnes* v. *Chipp*. (1) The three parts ought to be equal, but at

completed, forthwith notify to the seller or his agent selling the article his intention to have the same analysed by the public analyst, and shall [offer to] divide the article into three parts to be then and there separated, and each part to be marked and sealed or fastened up in such manner as its nature will permit, and shall, if required to do so, [proceed accordingly, and shall] deliver one of the parts to the seller or his agent. He shall afterwards retain one of the said parts for future comparison and submit the third part, if he deems it right to have the article analysed, to the analyst."

By s. 13 of the Sale of Food and Drugs Act, 1899 (62 & 63 Vict. c. 51), the words above printed in brackets are repealed.

(1) (1878) 3 Ex. D. 176.

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any rate each part ought to be sufficient for the purpose of analysis. That is clear from the other provisions of the Act. One part has to be delivered to the seller, in order that the seller may be able to have that part analysed with a view to checking or correcting the analysis of the public analyst; the part which has to be retained "for future comparison" is retained in order that it may be sent by the justices to the Government analyst, at the request of either party, or at the justices' own discretion, under s. 22 of the Act of 1875, as amended by s. 21 of the Sale of Food and Drugs Act, 1899. Those provisions shew clearly that the requirements of s. 14 as to division of the sample are not properly complied with unless each part is sufficient for analysis. [He also referred to *Mason* v. *Cowdary* (1) and *Smith* v. *Savage*. (2)]

Bankes, K.C. (*Leslie Scott* with him), for the respondent. The provisions of s. 14 do not mean that the article purchased must in all cases be divided into three equal parts, or into three parts each of which is sufficient for analysis. It may often be impossible to make such a division, for it may be impossible to purchase a sufficient quantity of the article to enable that to be done. It cannot be said that, as a matter of law, the justices cannot convict if each of the three parts is not sufficient for analysis; that question must be dealt with by the justices as one of fact, and, if they are satisfied that some of the divided parts are of insufficient size, they may refuse to convict upon the ground that they are not satisfied with the evidence of adulteration. Here the justices have not so dealt with the case; and they have not found as a fact that the smaller parts were insufficient for analysis.

Pickford, K.C., was not heard in reply.

LORD ALVERSTONE C.J. This is an important case. In my opinion the provisions of the Act would be impaired if we took the view contended for by the respondent. In this case half a pint of brandy was purchased from the appellant by the respondent, who divided it into three parts; five ounces were sent to the public analyst; three ounces were retained for comparison; and

(1) [1900] 2 Q. B. 419. (2) [1905] 2 K. B. 88.

about two, but less than two and a half, ounces were given to the seller. The main point is whether the three parts into which the sample is divided must each be sufficient to enable what has been called, I think correctly, a "checking" analysis to be made. Now, s. 14 of the Act of 1875, as amended by s. 13 of the Act of 1899, provides that the person purchasing any article with the intention of submitting the same to analysis shall notify to the seller his intention to have the same analysed by the public analyst; and that notification has been held to be in the strictest sense a condition precedent to the right to institute a prosecution. Then the section says that the purchaser shall divide the article into three parts, each part to be marked and sealed or fastened up, and shall, if required to do so, deliver one part to the seller, and shall retain one part for future comparison, and shall submit the third part, if he deems it right to have it analysed, to the public analyst. It is contended for the respondent that it is not a condition precedent that the other two parts shall be of equal value for the purpose of analysis as the part which is submitted to the public analyst. In my opinion, the provisions of s. 14 are conclusive against that contention, and I think that even a superficial consideration of those provisions is sufficient to shew that each of the three parts must, at least, afford substantially the same facilities for analysis. I do not, of course, mean that they must all be mathematically equal, but, in my judgment, there is no good ground for the argument that the section is satisfied if the part which is submitted to the public analyst for the purpose of founding a prosecution alone affords sufficient facilities for analysis. The subsequent provisions of the Act confirm me in this view. Sect. 20 provides that when the public analyst has analysed the portion which has been sent to him and has given his certificate from which it may appear that an offence has been committed, the person causing the analysis to be made may take proceedings. Then s. 21 says that at the hearing the part retained by the purchaser shall be produced; and s. 22, as amended by s. 21 of the Act of 1899, provides that the justices before whom the complaint is made shall at the request of either party, or without such request if they think

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fit, cause the article—that is, the portion retained by the purchaser and produced in Court—to be sent for analysis to the Commissioners of Inland Revenue. Either party, therefore, has an absolute right to have that analysis. Then we must consider the third portion which, if required, is to be delivered to the seller. It would be little less than a farce if that part were not sufficient for the purpose of analysis on behalf of the seller. The whole scheme of the Act, therefore, seems to shew that the sufficiency for the purposes of analysis of these two portions which are retained is a condition precedent to the prosecution of the proceedings. One good reason why this should be so is that, under s. 21, the justices may act upon the production of the certificate of the public analyst without any further evidence. It is, therefore, most important that there should be a proper opportunity of checking or correcting any analysis made by the public analyst. I have, therefore, come to the conclusion, not that the three parts into which the article is divided must be mathematically equal or identical in every respect, but that each part must at least be sufficient for the subsequent purposes contemplated by the statute, that is, for analysis by a Government analyst or by an analyst on behalf of the seller. It is really not disputed in this case that two of the parts did not fulfil that purpose; the part given to the seller and the part retained for comparison were not sufficient for the purpose of analysis. I entertain no doubt that, in order to found a prosecution, the person purchasing an article with a view to analysis must so divide the article that each of the three parts may be sufficient for analysis. If the contrary were held, the Act would, in my opinion, be open to grave objection. It seems clear from the statement of the case that the justices came to the conclusion that it was not necessary that the other two parts should fulfil the same conditions as the part sent to the public analyst, and that being so, this conviction ought not to stand. With regard to the suggestion made by counsel for the prosecution that there may be cases in which it is impossible to divide the article into three sufficient parts, I can only say that I have heard very many of these cases and have never heard that suggestion made before, and that, if that be so, it is a matter for the Legislature

to deal with. I am of opinion, therefore, that this conviction must be quashed.

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LAWRANCE and RIDLEY JJ. were of the same opinion.

Judgment for the appellant. Conviction quashed.

Solicitors for the appellant: *A. B. Sanders, for Thompson, Hughes & Mathison, Birkenhead.*

Solicitors for the respondent: *Pritchard, Englefield & Co., for Cecil Holden & Cotton, Birkenhead.*

W. A.

Considered. LAWSON *v.* ODHAMS PRESS, LTD. [1948] 2 All E.R. 717. *Referred to.* LAWSON *v.* ODHAMS. [1949] 1 K. B. 129

[IN THE COURT OF APPEAL.]

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Feb. 5, 6.

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Practice—Discovery—Interrogatories—Defamation—Libel in Periodical Publication—Defence of Fair Comment—Information on which Defamatory Statement founded—Names of Informants.

In an action of libel against the publishers of a trade periodical, in respect of an article contained in an issue of their periodical, the defendants pleaded by way of defence that, in so far as the words complained of consisted of expressions of opinion, they were fair comment, made in good faith, and without malice, on a matter of public interest, and, in so far as they consisted of allegations of fact, they were true in substance and in fact. The plaintiffs administered to the defendants, among others, interrogatories which were substantially as follows: (5.) What information had you, when you published the said words, which induced you to believe that the expressions of opinion in the said words contained, and which you allege to be fair comment, made in good faith, and without malice, were true? Did you in fact believe that the said opinions were true? (7.) From whom did you obtain the information on which you relied in publishing the said expressions of opinion? The defendants objected to answer these interrogatories:—

Held, that the fifth interrogatory was admissible, and must therefore be answered, but that, according to the general rule of practice in actions of libel against the publishers of newspapers in respect of matter published in their newspapers, the seventh interrogatory was, in the absence of

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special circumstances, inadmissible, and the defendants ought not to be compelled to answer it.

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APPEAL against an order made by Sutton J. at chambers directing the defendants to make further answers to interrogatories as after mentioned.

The action was for libel.

The facts, as alleged in the statement of claim, were, so far as material, as follows: The plaintiffs were a society founded in 1860, and registered under and by virtue of the Industrial and Provident Societies Act, 1893, which carried on a large and extensive business for the supply and manufacture of all kinds of food, clothing, and household and other goods at about sixty shops and sundry farms, works and factories situate in Plymouth, Devonport, Stonehouse and Brixton, in the county of Devon, and Torpoint and Millbrook, in the county of Cornwall. In addition to the aforesaid business, the plaintiffs received on behalf of the members of the society contributions to its share and loan capital, on terms as to withdrawal and repayment thereof contained in the society's rules. Such moneys were invested by the plaintiffs in the purchase of stock and in new buildings, and by way of advances to members of the society on mortgages of houses and premises. The defendants were the proprietors and publishers of a weekly newspaper, called the *Tradesman and Shopkeeper*. It was alleged that, in the issue of the defendants' newspaper published February 25, 1905, the defendants falsely and maliciously wrote and published, and caused to be written, printed and published, of and concerning the plaintiffs, and of and concerning their society's said trade and business and its financial stability and the management and conduct thereof, and the society's reputation in the way of its trade and business, the words and figures following, that is to say: "Speedy Retribution. Last week I predicted an early crisis in the affairs of the Plymouth Society" (meaning the plaintiffs) "and it has come even more speedily and more dangerously than I had dared to anticipate. At this moment the concern" (meaning the plaintiffs' business) "is in the throes of bankruptcy. An ugly run on it has set in, for a large section of the better informed portion of the membership have discovered the true state of affairs, and are naturally

anxious to save themselves before the seemingly inevitable crash comes. During the last two or three weeks the run has been extending, and there appears to be no possibility of stopping it, all the indications tending rather to the belief that it will get worse. Already immense sums have been drawn out, and the officials are at their wits' end for money. The enormous new bakery, which is being built at a cost of 30,000*l.* has had all work stopped upon it owing to financial difficulties, and the machinery has not been put in, though it has been ready for some time past. I understand that an endeavour is being made to dispose of, either by letting or selling, the warehouse recently erected at North Quay at a cost of about 12,500*l.* No stone is being left unturned to obtain money with which to meet the terrible drain of withdrawals which is taking place. More to follow. The worst has yet to come, however. A number of committee meetings have been held during the last week in reference to far more serious questions. An employee of the society has been found to have misappropriated a large sum of money, and the directors dare not risk further frightening the members by instituting a prosecution. The committee" (meaning the committee of the said society) "have also discovered an enormous discrepancy in the last (December, 1904) balance-sheet, which I am given to understand, but cannot say definitely, involves thousands of pounds. It is more than probable that these revelations are only the forerunners of much more terrible ones. A steady drain upon the society's resources has been going on for a long time, both in the matter of sales and share withdrawals, and now, when this has developed into a positive panic, none can say what will happen. It has been obvious for the past two years that the concern was rushing headlong to disaster, and the members who get hurt in the eventual climax will do me the justice to acknowledge that they have not been without warnings. The present position is only the realization of what I have foretold dozens of times since first my attention was drawn to the business more than two years ago."

The statement of defence, after paragraphs traversing the allegations of the statement of claim, stated (4.) that the defendants' said newspaper was one circulating among tradesmen,

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shopkeepers, members of co-operative societies and the general public, to whom the proceedings and position of the plaintiff society were matters of interest, and (5.) that, in so far as the words complained of consisted of expressions of opinion, they were fair comment, made in good faith and without malice, on a matter of public interest, and, in so far as they consisted of allegations of fact, they were true in substance and in fact. Then followed particulars of justification.

The plaintiffs had obtained leave to administer, and had administered, to the defendants, to be answered by their secretary, certain interrogatories of which the fifth, sixth and seventh were as follows: "(5.) What information had you, when you wrote $\frac{\text{and}}{\text{or}}$ printed $\frac{\text{and}}{\text{or}}$ published, or caused to be written $\frac{\text{and}}{\text{or}}$ printed $\frac{\text{and}}{\text{or}}$ published, the said words and figures" (the words and figures set forth in the statement of claim) "which induced you to believe that the expressions of opinion, or any and which of them, in the said words and figures contained, and which you allege in paragraph 5 of the defence herein are fair comment, made in good faith and without malice, were true? Did you then in fact believe that the said opinions were true? (6.) State what steps you took before writing $\frac{\text{and}}{\text{or}}$ printing $\frac{\text{and}}{\text{or}}$ publishing, or causing to be written $\frac{\text{and}}{\text{or}}$ printed $\frac{\text{and}}{\text{or}}$ published, the said opinions to test the said information, and to ascertain whether the said opinions, or any and which of them, were founded on fact. (7.) From whom did you obtain the information upon which you relied in writing $\frac{\text{and}}{\text{or}}$ printing $\frac{\text{and}}{\text{or}}$ publishing the said expressions of opinion, or any and which of them?"

The answers of the defendants to the fifth and seventh interrogatories were as follows: "(5.) In answer to the fifth interrogatory, I say that the defendant association had information of the facts alleged in the said words and figures, and those responsible for the publication of the said words and figures believed the said information, and that the said opinions were justified, and therefore true. (7.) I object to answer the seventh interrogatory on the ground that the same is irrelevant, and not administered bona fide for any purpose of this suit."

The plaintiffs applied to a master at chambers for an order that the defendants should make further and better answer to

the fifth interrogatory and should answer the seventh interrogatory, which application he granted, and on appeal Sutton J. affirmed his order.

Montague Lush, K.C., and *F. Dodd*, for the defendants. It must be admitted that, assuming that the fifth interrogatory was admissible, the answer to it is insufficient; but it is submitted that neither that interrogatory nor the seventh ought to have been allowed, and that the Court ought not, therefore, to compel the defendants to answer them. Substantially the answer to the fifth interrogatory may be treated as equivalent to an objection to the interrogatory. It is true that, in cases where the defence of privilege was pleaded in actions of libel, an interrogatory similar to the fifth interrogatory has been allowed: see *Elliott* v. *Garrett* (1) and *White & Co.* v. *Credit Reform Association and Credit Index, Ld.* (2); but the defence of fair comment does not stand for this purpose on the same footing as the defence of privilege. In the case of a plea of privilege such an interrogatory is relevant, because the information upon which the defendant acted in publishing the libel is material to the question whether there was actual malice on his part. No issue as to actual malice really arises in relation to the defence of fair comment. That defence does not depend on any question of privilege. The effect of it is to shew that what is complained of as a libel is not a libel. The meaning of "fair" as used in this connection is that the words complained of do not go beyond the bounds of what may fairly be considered criticism or comment on a matter of public interest, and do not, under the guise of commenting on such a matter, attack the plaintiff in his private character: see *McQuire* v. *Western Morning News*. (3) If what is complained of does not exceed the limits of fair comment, it is quite immaterial what the defendant's motives were, and whether he was actuated by malice or not in publishing it. There is no case in which such interrogatories as these have been allowed where the defendants have pleaded justification, and the substantial issue in the action is whether the statements of fact complained of are true. If the

(1) [1902] 1 K. B. 870. (2) [1905] 1 K. B. 653.
(3) [1903] 2 K. B. 100.

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defendants in this case fail in proving their defence of justification, obviously they will have to pay substantial damages. On the other hand, if they succeed in shewing that the allegations of fact complained of are true, it is equally obvious that in the present case the few lines in the alleged libel which consist of comment could hardly entitle the plaintiffs to substantial damages. In either case the very small portion of the alleged libel that can be called comment will be of quite trifling importance. The substance of the libel consisting of allegations of fact, what is the materiality of the defendants' state of mind in publishing it, or of the question whether they bona fide believed in the truth of what they were publishing? Where the only defences are that the matter published is not a libel, and that it is true, no question of the defendant's belief and his motive in publishing the libel really arises.

It is submitted that at any rate the seventh interrogatory clearly was not admissible. The cases shew that, in actions of libel against newspaper proprietors in respect of matter published in their newspapers, the general rule is that the defendants will not be compelled to disclose the names of the persons from whom they derived the information on which they relied in publishing the alleged libel: see *Hennessy* v. *Wright* (1) and *Hope* v. *Brash.* (2) There are no special circumstances in this case which would justify any departure from that rule. The defendants having justified, it is obvious that the effect of the seventh interrogatory might be to compel them to give the names of persons who would be their witnesses on the plea of justification; and further, there is a strong probability that the object is to obtain the names of such persons in order to bring actions against them: see *Edmondson* v. *Birch & Co.* (3) It is submitted that prima facie such an interrogatory is objectionable. [They also cited *Parnell* v. *Walter* (4); *Joynt* v. *Cycle Trade Publishing Co.* (5); *Caryll* v. *Daily Mail Publishing Co.* (6)]

Clavell Salter, K.C., and *Bartley Denniss* (*C. W. Mathews* with them), for the plaintiffs. It is impossible to lay down any

(1) (1888) 24 Q. B. D. 445.
(2) [1897] 2 Q. B. 188.
(3) [1905] 2 K. B. 523.
(4) (1890) 24 Q. B. D. 441.
(5) [1904] 2 K. B. 292.
(6) (1904) 90 L. T. 307.

absolute rule with regard to the admissibility of interrogatories in such cases as this, and it must always be very much a matter of discretion to be exercised according to the particular circumstances of each case: see per Mathew L.J. in *Elliott* v. *Garrett*. (1) The master and judge have here exercised their discretion in the matter in favour of the plaintiffs, and, unless it could be shewn that there was an absolute rule against such interrogatories, this Court would not interfere with the exercise of their discretion. The defendants have not taken any objection to the fifth interrogatory, but have answered it; consequently the only question is whether their answer is sufficient. But the cases of *Elliott* v. *Garrett* (1) and *White & Co.* v. *Credit Reform Association and Credit Index, Ld.* (2), shew that the fifth and the seventh interrogatories are both admissible. The principle of those cases applies to the defence of fair comment as much as to the defence of privilege. It is essential to the defence of fair comment to shew that the defendant was bona fide exercising the right to comment on a matter of public interest, and was not, under the guise of exercising that right, giving vent to private malice: see *Campbell* v. *Spottiswoode*. (3) Assuming the defences of fair comment and privilege to stand on the same footing in this respect, the case of *White & Co.* v. *Credit Reform Association and Credit Index, Ld.* (2), is a distinct authority that in such a case as this an interrogatory in the form of the seventh interrogatory is admissible. It is submitted that there can be no rule conferring a special immunity on publishers of newspapers in this respect. The cases do not establish that there is any such rule. The utmost that they establish is that, as a matter of discretion, in actions of libel against newspapers in the ordinary sense of the term, the defendants will not be compelled to disclose the names of contributors or informants, but the defendants in this case are not really within the scope of those cases. The cases of *Hennessy* v. *Wright* (4) and *Hope* v. *Brash* (5) applied to newspapers in the ordinary sense of the term. The defendants' publication is more in the nature of a

(1) [1902] 1 K. B. 870.
(2) [1905] 1 K. B. 653.
(3) (1863) 3 B. & S. 769.
(4) 24 Q. B. D. 445.
(5) [1897] 2 Q. B. 188.

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trade circular, such as was the publication in *White & Co.* v. *Credit Reform Association and Credit Index, Ld.* (1) It appears from the description of the defendants' association that their publication addresses itself to, and is published in the interests of, a limited class, between whom and co-operative societies there would be great rivalry and jealousy. It may reasonably be thought that a great public journal like *The Times*, which addresses itself to and is published in the interests of the general public, and which takes full responsibility on itself for what it publishes, ought not to be compelled to disclose the names of its contributors or informants, but the same considerations do not apply to a publication such as that of the defendants. The judgments in the case of *Hope* v. *Brash* (2) shew that there is no absolute rule on the subject, and that under special circumstances the publishers of a newspaper may be compelled to disclose the names of their informants. In *Edmondson* v. *Birch & Co.* (3) there was distinct evidence that the interrogatory was not put bona fide for the purposes of the action, but in order to obtain the name of the defendants' informant, with the intention of bringing an action against him. There is no evidence in the present case of any such intention, and the fact that the answer to the interrogatory may have the incidental effect of disclosing the names of witnesses or persons who may be liable to actions at the suit of the plaintiffs, is no reason why the interrogatory, being relevant to the plaintiffs' case, should be disallowed.

Montague Lush, K.C., for the defendants, in reply.

VAUGHAN WILLIAMS L.J. The question really argued before us was whether interrogatories Nos. 5 and 7 in this case are such as ought to have been allowed to be administered. The defendants do not by their answer in terms object to the fifth interrogatory, and affect to answer it, but they object to answer the seventh interrogatory on the ground that it is irrelevant, and not put bona fide for the purposes of the action. But in truth upon the argument in this Court the sufficiency of the answers was not

(1) [1905] 1 K. B. 653. (2) [1897] 2 Q. B. 188.
(3) [1905] 2 K. B. 523.

really the subject of discussion; the matter discussed was, as I have said, whether the questions ought to have been allowed to be put.

I will deal first with the fifth interrogatory, and I shall deal with it on the assumption that the question is whether it ought to be put. The defendants' counsel admitted that the answer to it was evasive, and argued that it really amounted to a round-about mode of objecting to the interrogatory as inadmissible. The fifth interrogatory is as follows: [The Lord Justice then read the interrogatory.] Before dealing with the question whether that interrogatory is one which ought to have been allowed, one has to consider the nature of the action brought. The action is one of libel brought by the plaintiffs, who are a co-operative society carrying on business at and in the neighbourhood of Plymouth, against the defendants, the Traders' Publishing Association, Limited. The defendants' publication is not exactly a newspaper in the ordinary sense of the term, but it is no doubt a periodical trade publication; and one has only to consider the description given of the plaintiff society and that given of the defendants' association to see that it would be very natural that there should be a good deal of rivalry and hostile feeling between them. The alleged libel makes very strong statements to the detriment of the plaintiffs, which I need not go through at length, but which in substance impute to the plaintiffs that their business is in a very bad way, that it is indeed in the throes of bankruptcy, that immense sums of money have been drawn out, and that the committee are well aware of the true state of affairs and have discovered an enormous discrepancy in the balance-sheet, but do not dare to bring the truth to the knowledge of the shareholders. That being the nature of the alleged libel, the defendants plead (inter alia) in the fifth paragraph of the defence that, in so far as the words complained of consist of expressions of opinion, they are fair comment, made in good faith and without malice, on a matter of public interest, and, in so far as they consist of allegations of fact, they are true in substance and in fact. That is, shortly stated, a plea of fair comment coupled with a plea of justification. It is not necessary, as it seems to me, to consider what the state of things with regard to such an interrogatory as

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the fifth interrogatory would have been under the old system of pleading, though I wish to guard myself against being supposed to say that such an interrogatory would not have been admissible in the old days, before the Judicature Act, 1873; and, if admissible then, it would appear to be admissible now. We are dealing with a case in which the defence set up is not that of privilege strictly so called, but one of fair comment. We need not, I think, discuss the question how far the defence of fair comment depends on precisely the same considerations as that of privilege, a matter on which judicial opinion has varied in the past. This at any rate seems to be clear. If the defence set up in an action of libel is one of privilege, then the existence of what has been called express malice becomes a question of fact which is raised on the issues for trial. Similarly, if the defence is one of fair comment, then the fairness or otherwise of the comment is a question which is at issue on the trial. I do not desire to deliver an unnecessarily long judgment on this point, but, as long ago as the case of *Campbell* v. *Spottiswoode* (1), Crompton J. pointed out that, when in actions of libel the defence of fair comment is raised, the question is whether the defendant fairly and bona fide wrote and published the matter alleged to be libellous; in other words, that the fairness or unfairness of the libel was in such cases always in issue. Under these circumstances I shall assume, without further discussion, that, the question of the fairness of the comment being raised by such a defence as is here pleaded, upon that question the matter inquired into by the fifth interrogatory is plainly a matter relevant upon this issue as to the fairness of the comment. In the case of *Elliott* v. *Garrett* (2), an interrogatory very similar to the fifth interrogatory in this case was allowed in an action of slander, in which privilege was pleaded. I will not refer to the judgments in that case, but will pass on to the later case of *White & Co.* v. *Credit Reform Association and Credit Index, Ld.* (3), in which the decision in *Elliott* v. *Garrett* (2) was followed, and it was held in an action of libel against a trade protection society, in which privilege was pleaded, that an interrogatory asking the defendants what

(1) 3 B. & S. 769. (2) [1902] 1 K. B. 870.
(3) [1905] 1 K. B. 653.

inquiries they made as to the truth of the statements complained of before publishing them, and from whom they obtained the information on which they relied in publishing those statements, was admissible. Collins M.R. said, in delivering judgment: "It is necessary to consider the position of the parties to the action in order to determine whether this interrogatory is admissible. The statements complained of being assumed for this purpose to give prima facie a cause of action, the defendants set up by way of answer that the publication of them was privileged, on the ground that those statements were published by them without malice and bona fide in the belief that they were true, to persons who had an interest in knowing the matters so stated. It is contended for the defendants that it is not sufficiently relevant to the issue on that defence to inquire from whom the information upon which the defendants relied was obtained. Now, to begin with, it is clear law, since the case of *Elliott* v. *Garrett* (1), that the interrogatory here in question is, as regards its main substance, legitimate. The interrogatory allowed in that case was: 'What information, if any, had you that induced you to believe that the words were true, or what steps, if any, had you taken before speaking the words to ascertain whether they were true or not?' Therefore it is clear that, the question being as to the condition of mind of the person publishing the defamatory statement, the amount of information upon which he acted, and the means taken by him to ascertain the truth of that statement, are legitimate subjects for interrogation. If so, why should one stop there? The issue being as to the condition of mind of the defendants when the libel was published, and whether they were actuated by malice, an important factor would be, not merely what inquiry they made into the truth of the statements published, but to whom such inquiry was addressed." It seems to me that that case shews that an interrogatory of this kind is just as relevant and admissible in a case where the defence is fair comment as in one where it is privilege. In either case the question raised is really as to the state of mind of the defendant when he published the alleged libel, the question being in the one case whether he published it in the spirit of malice, in

(1) [1902] 1 K. B. 870.

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the other whether he published it in the spirit of unfairness. In either case I think such an interrogatory as the one now in question is admissible. I do not propose to say any more with regard to the fifth interrogatory.

We have now to deal with the seventh interrogatory, which raises a much more difficult question. That interrogatory is as follows: [The Lord Justice then read the interrogatory.] Now, if the only test one had to apply, in deciding whether this interrogatory was admissible, were whether it was relevant to any issue raised in the action, I think it would be difficult to say that it was not so relevant; but, besides the rule that an interrogatory, in order to be admissible, must be as to relevant matters, there is the rule that it must not be such that to compel the party interrogated to answer it would be oppressive, and further that, though it may be relevant, it will not be admissible, if it be put by the interrogator for some purpose altogether outside the action, for instance, for the purpose of bringing another action against some other person than the party interrogated. I do not think that it was disputed by the plaintiffs' counsel that, if it were plain that the interrogatory was put for some purpose outside the action, it would be right to refuse to allow it to be put; but they argued that it was sufficient for them to shew that it inquired as to matters relevant in the present action, and that it was no objection to its admissibility that the answer to it might possibly be afterwards used for some purpose outside the action; that there must be some evidence before the judge to shew that it was put by the interrogator with the intention of so using it, and in the absence of any such evidence it ought to be allowed. On the other hand the defendants' counsel said that in such a case the onus was the other way, and that, even if there were no positive evidence that the interrogatory was put with the intention of using the answer to it for some purpose outside the issue in the action, it ought not to be allowed on the ground that a general rule has been laid down with regard to interrogatories asking the names of the defendant's informants in a case like the present that prima facie such an interrogatory ought not to be allowed. That contention was based upon what was said by Lord Esher M.R. and the Lords Justices

who took part in the decision in the case of *Hope* v. *Brash.* (1) Lord Esher said: "It appears to me that in the case of *Hennessy* v. *Wright* (2) the very same question in substance as that in the present case came before the Court of Appeal, namely, whether the defendant in an action for a libel published in a newspaper ought to be forced to disclose who it was that supplied him with the materials for the libel which had been published. To the judgment in that case I was a party; and Lindley L.J., after being informed that the general practice of the judges of the common law Courts had been for a long series of years not to order inspection in such a case, or to force the defendant to disclose who gave the information on which the libel was published, accepted that practice as binding upon him, and did not dissent from the view taken by myself and Lopes L.J. Therefore in that case the Court of Appeal recognized the existence of a general rule that inspection of such a document as this should not be given to the plaintiff in an action for libel. It is not necessary to say that the Court will never under any circumstances allow such inspection, but, in the exercise of its discretion, it will not, as a general rule, in the absence of any special reason to the contrary, allow it." In the same case A. L. Smith L.J. said: "It has been the ordinary rule of practice, as laid down by Lindley L.J. in *Hennessy* v. *Wright* (2), that in a case such as this an order will not be made by which the plaintiff may obtain discovery of the name of the person who originally wrote the libel published in a newspaper. I do not say that the rule so laid down is one which can never be departed from, but there must be something exceptional to take a case out of it." Rigby L.J. said: "Independently of the law laid down in *Hennessy* v. *Wright* (2), I doubt whether a case for inspection was here made out; but in that case an exception from the general law as to discovery was made in the case of libel, and I am bound by the rule there laid down." It seems to me that under these circumstances the question which we have to ask ourselves is whether there are any special circumstances in this case which would justify a departure from the general rule of practice as to not compelling the disclosure of the names of the persons who

(1) [1897] 2 Q. B. 188. (2) 24 Q. B. D. 445.

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Vaughan Williams L.J.

supplied the information on which the alleged libel was based in cases of this kind, where the proprietors of a newspaper or other periodical publication set up a defence such as is here pleaded. I do not find any such special circumstances in this case. It is true that the rivalry existing between the plaintiffs as a co-operative society and the defendants as publishers of a paper such as theirs does perhaps to some extent differentiate the position of the defendants from that of an ordinary newspaper, but their publication is nevertheless a periodical which deals with matters interesting to a large number of the public, and I think that they are entitled to be dealt with for the present purpose on the same footing as the publishers of a newspaper. Putting aside the question whether the defendants are entitled to be so dealt with, I can find nothing which appears to me to constitute a special circumstance justifying a departure from the general rule laid down in *Hope* v. *Brash*. (1) That being so, I think that the seventh interrogatory is one which ought not to have been allowed. The result is that the appeal succeeds as to the seventh, but fails as to the fifth interrogatory.

STIRLING L.J. I am of the same opinion. This is an action of libel to which the defendants have pleaded that, in so far as the words complained of consist of expressions of opinion, they are fair comment, made in good faith and without malice, on a matter of public interest, and, in so far as they consist of allegations of fact, they are true in substance and in fact. The defendants therefore allege that, so far as the words complained of consisted of expressions of opinion, they constituted fair comment made in good faith and without malice: and consequently the existence of good faith and the absence of malice are part of the defence. The question is, that being so, what interrogatories the plaintiffs are entitled to put. As to that I would refer to what was said by Lord Esher M.R. in *Hennessy* v. *Wright* (2), which was an action of the same kind as the present. He said: "The objection taken by the defendant is that the answers to the interrogatories in question cannot disclose anything which can be fairly said to be material to enable the plaintiff either to

(1) [1897] 2 Q. B. 188. (2) 24 Q. B. D. 445.

maintain his own case or to destroy the case of his adversary. It must be admitted that, if the answers could be material for either of these purposes, the interrogatories ought to be answered, but I think it must equally be admitted that, if the answers could not be material for either of these purposes, we ought not to order the defendant to answer. The question, therefore, is whether the answers to the interrogatories objected to could, in our view, be material for either purpose." Interrogatories by one party are therefore generally admissible if they are directed to matters which would tend to destroy the other party's case; as, for instance, it is contended in the present case these interrogatories would do by shewing that the comments made by the defendants were not made in good faith and without malice. In my judgment there is nothing to the contrary of that contention in what was said by the present Master of the Rolls in *McQuire* v. *Western Morning News*. (1) In that case it appears from the report that the defence set up was similar to that set up in the present case, namely, that the matter complained of was published by the defendants in the ordinary course of their business as public journalists, and without any malice to the plaintiff, and that it was a fair and bona fide criticism upon the play referred to in the statement of claim and its performance, which were matters of public interest, and was therefore no libel. Absence of malice having been thus pleaded, at the trial no evidence was given of anything which could shew malice. The Master of the Rolls began his judgment by saying: "It was not suggested that there was any evidence of actual malice, there were no personal imputations, nor could any statement of fact be impugned." Thereupon he proceeds in his judgment to discuss the case on the footing that all question of malice was eliminated from it. So the point which we have to decide does not come within the scope of anything said in that judgment. Therefore we have to apply the rule as laid down in *Hennessy* v. *Wright* (2) to the two interrogatories in question. The first of them is the fifth interrogatory, which is directed to ascertaining the information which the defendants had when they published the alleged libel. My Lord has pointed out that similar interrogatories were allowed

(1) [1903] 2 K. B. 100. (2) 24 Q. B. D. 445.

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in *Elliott* v. *Garrett* (1) and *White & Co.* v. *Credit Reform Association and Credit Index, Ld.* (2) Furthermore the defendants have answered the interrogatory without taking any objection to it, and their answer is clearly insufficient. On these grounds I think the defendants must make a further and better answer to that interrogatory. With regard to the seventh interrogatory, which asks from whom the defendants obtained the information on which they relied in publishing the alleged libel, I agree with my Lord in thinking that the cases of *Hennessy* v. *Wright* (3) and *Hope* v. *Brash* (4) have laid down a rule from which we are not at liberty to depart, namely, that the Court ought not in such a case as this to compel discovery of the names of the persons from whom the information on which the defendants acted in publishing the alleged libel was derived, in the absence of special circumstances, and I also agree that no such special circumstances exist in the present case.

FLETCHER MOULTON L.J. I am of the same opinion. As to the fifth interrogatory, I can see very little difficulty, for I am clear that, both in cases in which the defence of privilege and in those in which the defence of fair comment is set up, the state of mind of the defendant when he published the alleged libel is a matter directly in issue, and therefore the question what information was then before him is so directly relevant to the issue as to form fit subject for an interrogatory. As to the seventh interrogatory I feel more difficulty, but in my opinion the course which the Court is adopting is the wiser course to follow in a case like the present, namely, in an action of libel where the truth of the libel has been put in issue and constitutes the real question in the action. There are great objections to requiring the names of the defendant's informants to be given in such a case, and although I cannot say that those names may not be relevant to the issue, and although I do not suggest that they could not be obtained at the trial, I do not think that they are so proximately relevant that it would be right to allow them to be made the subject of an interrogatory. It is evident,

(1) [1902] 1 K. B. 870.
(2) [1905] 1 K. B. 653.
(3) 24 Q. B. D. 445.
(4) [1897] 2 Q. B. 188.

however, that this case is near the border line. In the case of *White & Co.* v. *Credit Reform Association and Credit Index, Ld.* (1), which was in some respects similar to the present, although the incidents were not identical, the Court allowed an interrogatory asking the names of the defendants' informants. But the difference of the incidents in the two cases accounts, in my opinion, for the difference of the decisions in them; and I am so far from thinking that our judgment in this case conflicts with that of this Court in *White & Co.* v. *Credit Reform Association and Credit Index, Ld.* (1), that I should wish to say that, in my opinion, what was there decided is quite consistent with the view which we are now taking.

Appeal allowed in part.

Solicitors for the plaintiffs: *Law & Worssman, for Bond & Pearce, Plymouth.*

Solicitor for the defendants: *Sydney James.*

(1) [1905] 1 K. B. 653.

E. L.

1906
Feb. 8.

GUARDIANS OF WANDSWORTH UNION *v.* WORTHINGTON.

Poor Law — Pauper Lunatic — Maintenance — Lunatic's Estate — Payments by Receiver in Lunacy—Death of Lunatic—Arrears of Maintenance—Payments on Account—Appropriation—Limitation Act, 1623 (21 *Jac.* 1, *c.* 16), *s.* 3.

A lunatic not so found by inquisition was maintained in a pauper lunatic asylum by the guardians of a union from 1876 until her death in 1904 at an annual cost of about 21*l.* The lunatic was entitled to property producing about 8*l.* per annum. By an order in lunacy a receiver was appointed of this income of the lunatic, and was directed to apply the same in and for the maintenance and benefit of the lunatic. Pursuant to this order the receiver paid the income to the guardians from 1887 to 1903 for the maintenance of the lunatic, and the guardians in their books appropriated each payment of the receiver as a payment on account of the arrears of maintenance due to them at the date of each payment. At the death of the lunatic considerable arrears of maintenance were due to the guardians, and in an action by them against the administratrix of the lunatic for these arrears the administratrix contended that the guardians were only entitled to six years' arrears prior to the date of the writ:—

Held, that under the circumstances the payment by the receiver took the case out of the Statute of Limitations, and that the guardians were entitled to payment of all the arrears due to them.

In re Newbegin's Estate, (1887) 36 Ch. D. 477, and *In re Watson*, [1899] 1 Ch. 72, distinguished.

This was an action tried by Farwell J., sitting as an additional judge of the King's Bench Division.

In February, 1876, Mary Jane Worthington, a spinster and a person of unsound mind not so found by inquisition, was received into the Caterham Asylum, and was maintained there until her death in July, 1904, by the guardians of Wandsworth Union at an annual cost of about 21*l.*

Mary Jane Worthington had two sisters, who were also of unsound mind, and by an order made in July, 1886, by a master in lunacy, "In the Matter of Mary Jane Worthington, spinster, Caroline Amelia Worthington, spinster, and Agnes Louisa Worthington, spinster, persons of unsound mind not so found

by inquisition. And in the Matter of the Lunacy Regulation Act, 1862," Thomas Worthington, a brother of the lunatics, was authorized (amongst other things) to receive Mary Jane Worthington's share of the income of certain real and personal estate, to which the lunatics were entitled under the will of their grandfather, and to apply the same when received by him in and for her maintenance and benefit. In October, 1897, Thomas Worthington died, and by an order made in June, 1898, by a master in lunacy in the above-mentioned Matters, the defendant Catherine Worthington, a sister of the lunatics, was appointed receiver of the lunatics' income in the place of Thomas Worthington, and by a further order in lunacy made in the same Matters the defendant was ordered to apply Mary Jane Worthington's share of the income in and for her maintenance and benefit. Under these orders the receiver in lunacy for the time being paid Mary Jane Worthington's share of the income, which averaged about 8*l.* per annum, to the guardians for her maintenance from 1887 to 1903 inclusive; and the guardians' receipts were given generally on account of cost of maintenance, and in their books they allocated each payment in reduction of the arrears of maintenance due at the date of such payment. In particular, early in 1896 the guardians through their solicitors pressed Thomas Worthington for information respecting Mary Jane Worthington's estate, and in July, 1896, he paid their collector 137*l.* 8*s.*, stated to be accumulations of income which had then recently come to his hands and to which she was entitled from another source, and the collector gave him the following receipt: "Received of Mr. T. Worthington the sum of one hundred and thirty-seven pounds eight shillings on behalf of the above-named union in respect of arrears of the maintenance of Mary Jane Worthington on account of the sum of 353*l.* 16*s.* 6*d.* balance due to the guardians to the 26th of March, 1896." On the death of Mary Jane Worthington letters of administration to her estate were granted to the defendant, and the estate was sworn at 426*l.* The total amount expended by the guardians in the maintenance of Mary Jane Worthington from the year 1876 until her death in 1904, including 1*l.* 1*s.* for her funeral expenses, came to 620*l.* 15*s.*, and the total amount

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received by them on account of her maintenance during the said period, including the 137*l.* 8*s.*, came to 283*l.* 11*s.* 9*d.*, which left a balance of 337*l.* 3*s.* 3*d.* due to them. The guardians now sued the defendant, as administratrix of the estate of Mary Jane Worthington, for this 337*l.* 3*s.* 3*d.* The defendant alleged that the plaintiffs were only entitled to arrears of maintenance for the six years preceding the date of the writ less the sums they had received during that period. This left a balance of 90*l.* 17*s.* 6*d.*, which the defendant paid into Court and alleged was sufficient to satisfy the plaintiffs' claim. As to the residue of the plaintiffs' claim, the defendant set up the Statute of Limitations.

Sylvain Mayer, for the plaintiffs. The liability of a pauper lunatic for the cost of his maintenance by guardians of the poor constitutes a debt for which an action can be brought, and in answer to which he can set up the Statute of Limitations: *In re Newbegin's Estate* (1); *In re Watson.* (2) It is true that in both these cases the guardians were held entitled to only six years' arrears of maintenance prior to the commencement of the action, and the defendant here will no doubt rely upon them. It is submitted, however, that both of them are distinguishable from the present case, because in both of them no payments whatever on account of maintenance were made. Further, if a lunatic can set up the statute, then all other legal consequences ensue, and it is open to the other party to prove payments on account. Here from 1887 to 1903 the receiver in lunacy made continual payments on account, which take the case out of the statute. Further, a debtor can appropriate his payments, but if he does not do so then the creditor can appropriate the payments he receives to the earliest items in his account: *Mills* v. *Fowkes.* (3) Here the receiver in lunacy did not appropriate the payments he made on account of maintenance, and the guardians were entitled to allocate each payment they received to the arrears due to them at the date of such payment. The receipt given in July, 1896, supports this view. The guardians,

(1) 36 Ch. D. 477. (2) [1899] 1 Ch. 72.
(3) (1839) 8 L. J. N. S. (C.P.) 276.

therefore, are entitled to payment of all the arrears due to them at the death of the lunatic.

R. C. Glen, for the defendant. The guardians are only entitled to six years' arrears of maintenance prior to the date of the writ less the payments made during that period: *In re Newbegin's Estate* (1); *In re Watson*. (2) The payments by the receiver under the orders of the master in lunacy cannot be treated as payments on account. A receiver is an officer of the Court to carry out the orders of the Court, and he cannot make any admission to bind either the interest of the lunatic or the interests of other parties in the corpus of the lunatic's estate. If the receiver purports to pay on account, that would not be in accordance with his duties as an officer of the Court. Here the orders only direct payment of income in the maintenance of the lunatic, and, if they are at all payment on account, they are payments on account of the maintenance for the current year in which each payment was made, and no more.

FARWELL J. This is a case of some difficulty. The first point is settled by the two cases that have been cited, that the liability of a pauper lunatic for the cost of his maintenance constitutes a debt in respect of which he has the same rights and liabilities as an ordinary individual who is not a lunatic, that is to say, he can plead the Statute of Limitations; and then the same answers to the statute are open to the other side as are open to an ordinary individual. That being so, the case is reduced to this question: Is there anything here to take these arrears out of the statute? Mr. Glen's main point has been that the payments of income were made by the receiver in lunacy as an officer of the Court: but the receiver in lunacy made those payments by virtue of the order of the Court directing him to apply the income for the maintenance and benefit of the lunatic. Now the actual income of the lunatic was so small that it is perfectly obvious the payments were insufficient for and could only be on account of her maintenance, and it is also quite clear that the lunatic could not be maintained out of the income derived from her estate. I also take it for granted—and

(1) 36 Ch. D. 477. (2) [1899] 1 Ch. 72.

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Farwell J.

Mr. Glen did not contest this—that there must have been evidence before the Court of Lunacy, or the master in lunacy, that the lunatic was in this asylum, and that the Court must also have known that the income of the estate was so small that the payments which the receiver would make could only be payments, as far as they would extend, on account of the maintenance of the lunatic. To my mind, those payments on account were authorized by the Court, because it was for the benefit of the lunatic they should be made rather than that there should be litigation with the guardians to ascertain whether the corpus of the lunatic's estate should be sold out and out to pay the debt—a course the guardians would probably have taken if there had been no order for payment at all, or no order for payment without some qualification, or if the payments were not to be taken as payments on account so as to keep alive any claim for arrears. That, to my mind, answers the plea with regard to the statute, and that is strengthened by what occurred in 1896, when there was an accumulation of income in the hands of the receiver which he paid over to the guardians, and they gave a receipt in respect of the arrears of the maintenance of the lunatic down to March 24, 1896. That receipt was accepted by the receiver without objection, and I presume he brought it before the Court of Lunacy in the passing of his accounts. It appears to me, therefore, that there has been quite sufficient here to take the case out of the statute. The protection of lunatics by the Court is confined to protecting the lunatic so as to keep him or her alive and comfortable, during his or her life, and is not intended to deprive creditors of the amounts justly due to them, although they may have to wait until the time when the protection expires or comes to an end—that is to say, until the lunatic is dead. So far as morals are concerned, it appears to me that the claim of the guardians is very strong indeed. There will be judgment for the sum claimed.

Judgment for plaintiffs.

Solicitors: *W. W. Young, Son & Ward; S. W. Johnson & Son, for Fisher, Jesson & Wilkins, Ashby-de-la-Zouch.*

H. L. F.

PYE *v.* BRITISH AUTOMOBILE COMMERCIAL SYNDICATE, LIMITED.

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Feb. 8.

Contract—Damages—Forfeiture of Sum Deposited—Liquidated Damages or Penalty.

In deciding whether a sum made payable by way of compensation for breach of a contract is to be treated as liquidated damages or as a penalty, the Court must take all the circumstances into consideration, in order to ascertain the intention of the parties. The fact that the sum in question is to be paid on the breach of any one of a variety of stipulations of different degrees of importance does not necessarily oblige the Court to treat it as a penalty, although it raises a presumption that that was the intention of the parties ; nor does the fact that the sum in question had been deposited at the making of the contract compel the Court to treat it as liquidated damages, although it forms a material element to be taken into consideration in ascertaining the intention of the parties.

Action tried by Bigham J. without a jury.

By an agreement made January 29, 1904, between the defendants and the plaintiff, the defendants appointed the plaintiff as their sole agent for a district in Yorkshire for the sale of Talbot motor cars for the time being dealt in by the defendants, and agreed that so long as the plaintiff should be their sole agent in this behalf they would not deliver to any person resident or carrying on business in that district any Talbot motor cars.

By paragraph 7 of the agreement it was provided : " The agent will purchase from the company the goods mentioned in the second schedule hereto at the prices therein mentioned. The company will use its best endeavours to deliver the said goods at the dates respectively mentioned in the said schedule, but in the event of any of the goods not being delivered at the said dates the company shall not be under any liability in respect thereof, but the agent shall, nevertheless, accept and take delivery and pay for the said goods upon notice being given to the agent in accordance with clause 9. . . . . The agent having paid to the company the sum of 300*l.* as a deposit in respect of the said goods the said sum shall be repaid upon payment by the agent of the price of all the goods mentioned in the said schedule.

" 8. If the agent shall refuse to accept delivery and pay for

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any of the said goods the company shall be at liberty if it shall think fit so to do to declare the said deposit to be wholly forfeited, and in such event the said deposit shall be forfeited to the company as and by way of liquidated and ascertained damages. In the event of such refusal the agent shall no longer be the agent of the company. . . . . The company shall not in the event aforesaid be under any obligation to deliver such goods or any part thereof.

"9. When and so soon as any of the said goods are ready for delivering the company shall give notice thereof in writing to the agent in the ordinary course of post. If the agent shall not within the period of seven days from the giving of such notice take delivery of and pay for the said goods, the agent shall be deemed to have refused to accept such delivery."

By clause 10 the agreement was to continue in force until November 30, 1904.

The second schedule to the agreement contained the numbers and descriptions of ten motor cars to be delivered during the months of April, May, and June at prices varying from 320*l.* to 590*l.*, with a discount of 10 per cent.

The plaintiff having (as the learned judge found as a fact) committed a breach of this agreement, the defendants declared the deposit to be forfeited. This action was then brought to recover the 300*l.* as money had and received by the defendants to the plaintiff's use.

Tindal Atkinson, K.C. (*Compston* with him), for the plaintiff. This sum was made payable by way of compensation on the occurrence of one or more of several events of varying degrees of importance, and the presumption, therefore, is that the parties intended the sum to be penal and subject to modification: *Elphinstone* (*Lord*) v. *Monkland Iron and Coal Co.* (1); *Willson* v. *Love.* (2) It cannot have been intended that this 300*l.* should become payable if the plaintiff made default in paying for a motor car of less value than 300*l.*

McCall, K.C. (*Morton Smith* with him), for the defendants. The presumption that a sum of money expressed to be payable

(1) (1886) 11 App. Cas. 332. (2) [1896] 1 Q. B. 626.

on the breach of any of several stipulations of varying importance is to be treated as a penalty, and not as liquidated damages, has no operation where the sum in question is a deposit: *Wallis* v. *Smith*. (1) Jessel M.R. there said that in all cases of deposit the judges had held that that rule does not apply.

[BIGHAM J. To what cases was the Master of the Rolls then referring?]

Lea v. *Whitaker* (2); *Reilly* v. *Jones* (3); *Magee* v. *Lavell* (4); *Hinton* v. *Sparkes* (5); *Bergheim* v. *Blaenavon Iron and Steel Co.* (6); *Betts* v. *Burch* (7); *Cooper* v. *L. B. & S. C. Ry. Co.* (8) The effect of paragraph 7 of the agreement is that the sum deposited was not to be repaid unless all the goods had been paid for.

Tindal Atkinson, K.C., in reply. The remarks of Jessel M.R. in *Wallis* v. *Smith* (1) are entirely unsupported by authority, and they are criticized by Lord Esher M.R. in *Willson* v. *Love*. (9)

BIGHAM J. This was an action by the plaintiff to recover back a sum deposited by him with the defendants on the making of an agreement on January 29, 1904. The plaintiff says, in the events which have happened he is entitled to be repaid this sum as money in the hands of the defendants to his use.

The question depends on the construction of the agreement of January 29, 1904. It has been described as an agency agreement, but it is not so in point of law. It is an agreement by which the defendant company appointed the plaintiff to be their sole agent for a certain district in Yorkshire for the sale of Talbot motor cars, and by the same agreement it was stipulated that so long as the plaintiff should be their sole agent for that district, they would not deliver any of their motor cars to any person resident or carrying on business in that district.

The meaning of those two provisions is, as I think, that the defendants say that the plaintiff shall deal in their motor cars in that district, and that no one else shall, so far as the defendants are concerned, deal in these cars in that district, and that

(1) (1882) 21 Ch. D. 243.
(2) (1872) L. R. 8 C. P. 70.
(3) (1823) 1 Bing. 302.
(4) (1874) L. R. 9 C. P. 107.
(5) (1868) L. R. 3 C. P. 161.
(6) (1875) L. R. 10 Q. B. 319.
(7) (1859) 4 H. & N. 506.
(8) (1879) 4 Ex. D. 88.
(9) [1896] 1 Q. B. 626.

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the plaintiff shall be solely entitled to sell them. It was never intended, apparently, that the plaintiff should sell anything for or on account of the defendants. He was not their agent at all, but he himself was to buy from them motor cars at specified prices, to be delivered by the defendants at certain specified times. He was, therefore, to be a buyer from the defendants on the terms that the defendants should not sell any cars through any other person in the district, and if the plaintiff wanted to sell more cars, he was entitled to have them from the defendants. It was an agreement that the defendants should sell to the plaintiff certain cars at certain prices and at certain dates, and if it was broken the defendants were to be at liberty to sell their cars by other means in the district.

Now what happened was this. There was a breach of the agreement. [The learned judge then narrated the facts on which he came to this conclusion, and continued:—] The defendants then said: We now claim to forfeit the 300*l.*, the contract having been broken. The question is whether they are entitled to do so. They say that they are, by reason of the last words in clause 7 of the contract. It is said that the effect of those words is not only that the money shall be repaid on payment by the plaintiff of the price of all the goods supplied, but that it shall not be repaid unless they are all paid for. I am not sure whether that construction is right or not. The non-payment might be due to the defendants' conduct, and then they would clearly not be entitled to retain the 300*l.* If, for instance, they were to tender cars which were not in accordance with the contract, which the plaintiff, therefore, was not bound to receive, I do not think they would be entitled to retain the deposit. It may be urged that as they had chosen to put an end to the contract, and so to prevent the plaintiff from receiving any more cars, they have themselves put it out of the plaintiff's power to fulfil the contract, and therefore cannot retain the 300*l.* But that is, I think, immaterial, because in my opinion the defendants are entitled to retain the 300*l.* under clause 8.

I have to find out from the language there used what was the intention of the parties to the contract. If it were not for the authorities which are supposed to guide judges in endeavouring

to discover the intention of the parties, I should have no doubt about it. The plaintiff put 300*l.* into the hands of the defendants and subscribed an agreement which contains a statement that the defendants may keep that sum if he makes default in payment. Those circumstances point only, as it seems to me, to the intention that the defendants should keep the money if the events were to happen which have happened. But it is said that my finding as to the intention of the parties is to be controlled by the rules which have been laid down in the authorities which have been cited. I think the only rule which applies to all cases is that the judge must look to all the circumstances of each particular contract—to what the parties did as well as to the language used—and must say from them what the intention of the parties was. No doubt, notwithstanding the observations of Jessel M.R. in *Wallis* v. *Smith* (1), one thing to be taken into consideration is to see whether the sum agreed to be paid is to be paid on the happening of one event or of many events some of which may be of great and some of small importance, and with great deference to the criticism of Jessel M.R. in that case, I think the dictum of Lord Coleridge C.J. in *Magee* v. *Lavell* (2) is right when he said in the course of the argument: "The general principle of law appears to be that where the contract contains a variety of stipulations of different degrees of importance, and one large sum is stated at the end to be paid on breach of performance of any of them, that must be considered as a penalty." I have myself always understood that that is one of the rules which must guide a judge when he has to discover what the intention of the parties was. The only exception I would take to that dictum is the use of the word "must," and I am sure that Lord Coleridge C.J. did not mean to say that if other circumstances existed which would throw light on the intention of the parties in making the agreement a judge might not come to a contrary conclusion. He meant only that this fact was an important matter to take into consideration when seeking to find out the intention of the parties. I think that in that dictum the Chief Justice correctly laid down the law as expressed in the authorities.

(1) 21 Ch. D. 243. (2) L. R. 9 C. P. 107, at p. 111.

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Here I think that this sum of 300*l.* is a sum payable upon the happening of one of many possible breaches of different significance. I have already pointed out that the refusal to pay for a machine the price of which was less than 300*l.* might entail serious consequences to the defendants outside the non-payment of the price. It might make it necessary for the defendants to put an end to the contract and to make different arrangements for the sale of their motor cars in this district, and that fact may well have been in their minds when they entered into this agreement. It is impossible to say that the non-payment of the price of a particular motor car is the only damage which the defendants would sustain from the plaintiff's refusal to accept it. Therefore, although there are circumstances here which seem to bring the case within the rule enunciated by Lord Coleridge C.J., there are other circumstances which prevent that rule from applying. There is also this further fact that this agreement does not merely contain a stipulation that in the event of a breach of the contract the sum of 300*l.* shall be paid as liquidated damages. The plaintiff here has himself already paid this sum to the defendants. He has parted with the money, and that circumstance is significant to shew that he did not intend to have it back if he committed a breach of the agreement. I pray in aid, although I am not sure that I am entitled to do so, the language of Jessel M.R. in *Wallis* v. *Smith* (1), where he says: "Where a deposit is to be forfeited for the breach of a number of stipulations, some of which may be trifling, some of which may be for the payment of money on a given day, in all those cases the judges have held that this rule does not apply, and that the bargain of the parties is to be carried out." I have asked counsel if they could find me some of the cases to which the Master of the Rolls there referred, and although I think the cases which have been cited do not clearly support that remark of his, I think that there is some ground for saying that where the sum of money in question has been deposited, that is a circumstance which must be taken into account by a judge in ascertaining the intention of the parties. As to the exact words used in agreements as to the

(1) 21 Ch. D. at p. 258.

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sum being regarded as liquidated damages, and not as a penalty, it has been laid down that judges ought to disregard the expression "liquidated damages," although it has been knowingly used by the parties. I am not going to shut my eyes to that, but I think the expression was only to be disregarded in plain cases where the plain intention of the parties to be gathered from all the circumstances was that the sum was to be a penalty. That is not the case here, and so I cannot see why I should not give the words of the contract their plain meaning. Those words are "the said deposit shall be forfeited to the company as and by way of liquidated and ascertained damages."

It is said that I must say that this sum was a penalty because of the use of the word "forfeit." In my opinion the use of that word does not take away the significance from the plain language of the parties. I hold, therefore, that the plaintiff has forfeited this sum of 300*l.*, and that the defendants are entitled to judgment.

Judgment for the defendants.

Solicitors for plaintiff: *Neill & Holland, Bradford.*
Solicitor for defendants: *John Hands.*

A. P. P. K.

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Dec. 20, 21.

BOYLE, Appellant; SMITH, Respondent.

Licensing Acts—Offence—Sale of Beer in unlicensed Place—Liability of Licensee—Sale by Servant—Scope of Employment—Licensing Act, 1872 (35 & 36 *Vict. c.* 94), *s.* 3.

The respondent, who was licensed to sell by retail, at his brewery, beer for consumption off the premises, employed a drayman to deliver beer to customers. The drayman had no authority to sell any beer for the respondent, his sole duty being to deliver beer to customers only who had previously given orders for it, and he had been expressly ordered not to sell or deliver beer to other persons, and to bring back to the brewery any beer which he was unable to deliver. The drayman sold and delivered some bottled beer from his van to persons in a street who had not previously ordered it:—

Held, that the respondent was not liable to be convicted under s. 3 of the Licensing Act, 1872, which prohibits, under penalties, any person licensed to sell by retail intoxicating liquor from selling the same at any place where he is not authorized by his licence so to do.

Case stated under the Summary Jurisdiction Acts by a metropolitan police magistrate.

Five summonses were issued against the respondent upon an information by the appellant for unlawfully, upon five different days, selling beer at a place where he was not authorized by his licence to sell the same, contrary to s. 3 of the Licensing Act, 1872. (1)

All the summonses were heard together, and at the hearing the following facts were admitted or proved:—A licence had been granted to the respondent authorizing him to sell beer by retail for consumption off the premises of the Southwark Park Brewery, under which licence he was entitled to sell beer by retail at those premises only. Upon each of the five days mentioned in the summonses the respondent's drayman, Deeth, was in a street in

(1) 35 & 36 Vict. c. 94, s. 3: "No person shall sell or expose for sale by retail any intoxicating liquor without being duly licensed to sell the same, or at any place where he is not authorized by his licence to sell the same. Any person selling or exposing for sale by retail any intoxicating liquor which he is not licensed to sell by retail, or selling or exposing for sale any intoxicating liquor at any place where he is not authorized by his licence to sell the same, shall be subject to the following penalties . . . ."

charge of a van belonging to the respondent containing crates of bottled beer from the brewery, and upon each of those days Deeth sold and delivered in the street out of the crates beer by retail to two persons, who had not ordered any beer from the said brewery, whose names in no way appeared as customers or otherwise in the books of the brewery, who were strangers to Deeth, and who there and then in the street paid Deeth for the beer. The respondent had given orders to all his draymen not to deliver beer unless an order for the beer had been previously given at the brewery, and he took every care to prevent any beer being sent out which had not been so ordered. A notice was posted in the respondent's office, where all the employees could see it, to the following effect: "Important notice. Draymen are especially cautioned not to deliver to any person or persons unless the orders for same have been previously given by the customers or sent or taken to the brewery. To deliver beer unless an order is first given as above is illegal." Each drayman was required to keep a book for his own use upon his round containing the names of the customers on his round. A notice was posted up at the brewery as follows: "Notice to draymen. Sale of beer to private customers. Every drayman must keep a book for each day's delivery having the name, number of house, street or road, where any beer is delivered or about to be delivered, and the book must be produced immediately when stopped and asked for by any excise officer. All draymen must strictly carry out this order." A book was kept at the brewery shewing exactly the beer sent out, and the particular customers to whom the beer was to be delivered in accordance with the orders received. A special clerk checked the load on the dray before it went out. The beer was sold almost entirely for cash on delivery by the drayman, who was authorized to receive cash on delivery, and was required at the end of each day to bring back to the brewery all beer undelivered by him, and a proper amount of money for the beer which he had delivered during the day, so that the amount of beer and money brought back should tally with the amount and value of beer booked out. Occasionally customers, when called upon by the drayman for the purpose of delivering beer to them, were found

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by him to have left the address at which he had previously delivered beer, so that out of the load of beer taken out from the brewery the drayman would from time to time have some beer in his van which he had been unable to deliver. It was the duty of the drayman in those circumstances to bring back such beer to the brewery and to strike out from his round-book the name of the customer for whom it had been intended.

The magistrate dismissed the summons, upon the ground that the respondent was not responsible for the acts of the drayman Deeth.

It appeared from the case that, after the summonses against the respondent had been dismissed, summonses were issued against Deeth, charging him with offences under s. 3 of the Licensing Act, 1872, and he was convicted and fined.

The question for the opinion of the Court was whether, upon the above facts, the decision of the magistrate was correct in point of law.

Danckwerts, K.C. (*Bodkin* and *Bruce Williamson* with him), for the appellant. The respondent is responsible for the act of his servant in selling beer contrary to the provisions of s. 3 of the Licensing Act, 1872. Some one must be responsible for the contravention of the Act. In *Williamson* v. *Norris* (1) it was decided that a servant selling liquor, the property of his master, by his master's order, is not liable to a penalty under s. 3; and it would, therefore, follow that the master must be liable. A master may be liable for a criminal act done by his servant in the course of his employment: *Dyer* v. *Munday*. (2) In *Commissioners of Police* v. *Cartman* (3) a licensee was held to be guilty of an offence under s. 3 of the Act because his servant, contrary to his express orders, sold beer to a drunken person; and in *Bond* v. *Evans* (4) there was a similar decision with respect to permitting gaming on licensed premises. It would appear from the case that the drayman sold the beer in the course of his employment for his master, for this was not a casual act done once, but was frequently done.

(1) [1899] 1 Q. B. 7.
(2) [1895] 1 Q. B. 742.
(3) [1896] 1 Q. B. 655.
(4) (1888) 21 Q. B. D. 249.

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H. C. Biron, for the respondent. The magistrate having found that the respondent took every precaution to prevent an improper sale of beer, and that it was no part of the drayman's duty to sell beer, the respondent is not liable to a penalty under s. 3. A master is not liable for the unlawful sale of beer by his servant acting contrary to his orders: *Newman* v. *Jones*. (1) The duty of the drayman was only to deliver beer to customers who had previously given orders, and he had no authority at all to sell beer in any way. Therefore it was not within the scope of his employment to sell beer, and his master cannot be responsible for his act in so doing.

[He also referred to *Roberts* v. *Woodward*. (2)]

Danckwerts, K.C., in reply. *Newman* v. *Jones* (1) was not a case under the Licensing Act, but under the Revenue Acts, and has no application to the present case.

[He also referred to *Coppen* v. *Moore*. (3)]

LORD ALVERSTONE C.J. This is a case stated by a police magistrate upon a prosecution for selling beer, contrary to the provisions of s. 3 of the Licensing Act, 1872, on five separate days in a certain street. The only question before us is in respect of those sales to persons in the street. It raises a difficult point, and one, in my opinion, not entirely covered by any of the authorities which have been cited. There is a group of sections in the Act of 1872, under the heading "Offences against Public Order" (ss. 12—18), under which it has been decided that a licensee is liable to a penalty in one case for the conduct of a servant in charge of the premises in permitting gaming—*Bond* v. *Evans* (4), distinguishing *Somerset* v. *Hart* (5)—in another for an illegal sale of beer by his servant within the general scope of his employment though contrary to the licensee's express orders: *Commissioners of Police* v. *Cartman*. (6) I may refer also, by way of illustration only, to *Emary* v. *Nolloth* (7), where it was held that

(1) (1886) 17 Q. B. D. 132.
(2) (1890) 25 Q. B. D. 412.
(3) [1898] 2 Q. B. 306.
(4) 21 Q. B. D. 249.
(5) (1884) 12 Q. B. D. 360.
(6) [1896] 1 Q. B. 655.
(7) [1903] 2 K. B. 264.

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a licensee, who was himself in charge of the premises at the time, was not liable for an illegal sale to a child by his servant against the licensee's express orders. It has been urged upon us for the appellant that *Williamson* v. *Norris* (1) decided that a servant could not be prosecuted for a sale contrary to the provisions of s. 3, and that it followed that the master must be liable; but in that case the only decision was that a sale by a servant by his master's order was not a sale by the servant himself within s. 3. In my opinion, if a servant, having no authority to sell at all, chooses to make a sale, he, not being a licensed person, is liable to penalties under s. 3. The question we have to decide is whether the respondent is liable for the conduct of his drayman. In my opinion the magistrate has taken a correct view of the law, and the respondent is not liable. It cannot, I think, be contended that he is liable because the drayman, whom he has sent out to only deliver beer to customers, sells beer contrary to his orders. This is not a case of delegated authority within the class of cases of which *Bond* v. *Evans* (2) and *Commissioners of Police* v. *Cartman* (3) are instances. The business must be carried on in this way, for it cannot be argued that the respondent ought to go out and deliver all the beer himself. It seems to me that, the fact being that the drayman had no authority at all to do that which he did and was expressly forbidden to do it, there was not a sale by the master contrary to s. 3. For these reasons I am of opinion that the appeal must be dismissed.

LAWRANCE J. I am entirely of the same opinion. The duties of the drayman were to deliver beer to customers who had ordered it and, if for any reason he could not deliver it to them, to bring it back to the brewery, and he had express orders not to deliver beer to anyone else. It is quite true that, if the drayman was acting within the general scope of his employment in selling beer, it would be no answer for the master to say that he had expressly forbidden him to do so. In the present case, however, the drayman was employed only to deliver beer and not

(1) [1899] 1 Q. B. 7. (2) 21 Q. B. D. 249.
(3) [1896] 1 Q. B. 655.

to sell beer, and therefore the respondent cannot be made liable for what his servant did. 1905

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RIDLEY J. concurred.

Judgment for the respondent.

Solicitors for appellant: *Maitlands, Peckham & Co.*
Solicitors for respondent: *Skewes-Cox, Nash & Co.*

W. A.

MORGAN AND OTHERS, APPELLANTS; LICENSING JUSTICES OF AYLESFORD, RESPONDENTS. 1906 *Jan.* 15.

Licensing Acts—Licence—Renewal—Reference to Quarter Sessions—Report of Renewal Authority—Evidence at Quarter Sessions—Cross-examination as to licensed Houses not included in Report—Licensing Act, 1904 (4 *Edw.* 7, *c.* 23), *s.* 1.

Where the question of the renewal of an existing on licence is referred to quarter sessions by the renewal authority, with their report thereon, under s. 1 of the Licensing Act, 1904, the Court of quarter sessions ought not, on the hearing of the matter, to refuse to allow a cross-examination on behalf of the licence-holder of the witnesses called by the renewal authority, if the ground of that refusal be merely that the questions sought to be put in cross-examination relate to other licensed houses in the neighbourhood which are not included in the report of the renewal authority.

CASE stated by a committee of justices of the county of Kent, to whom the quarter sessions of the western division of that county had, under s. 5, sub-s. 2, of the Licensing Act, 1904 (4 Edw. 7, c. 23), delegated their power of determining any question as to the refusal of the renewal of a new licence under that Act.

The material facts stated in the case were as follows:—

The appellants were the tenant and owners respectively of a beer-house in the Brook, Chatham, called the Running Horse. The house was first licensed before 1869, and the licence had been continuously renewed down to the year 1905. The respondents were the licensing justices for the north division of the Lath of Aylesford, in which division the appellants' house was situate.

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At the general annual licensing meeting in 1905 the appellant, Kate Matilda Morgan, who was the tenant of the Running Horse, applied to the respondents for a renewal of her licence in respect of that house. The respondents, purporting to act under s. 1, sub-s. 2, of the Licensing Act, 1904, referred the matter to the Court of quarter sessions, together with their report thereon. The material facts in that report were: Before the general annual licensing meeting the respondents inquired into the question of the redundancy in the number of licensed houses in their district, and appointed committees who visited all such houses in the more congested parts of the urban districts (including Chatham) and collected statistics and other particulars regarding the same. Those committees were also instructed to select the houses the renewal of the licences of which they considered might with most advantage be referred to quarter sessions with a view to such renewal being refused in accordance with the provisions of s. 1 of the Licensing Act, 1904, the number of the houses so selected in each district not to exceed one-third of the total number which the committee for that district considered to be in excess of the requirements of the district. The committees duly made reports to the respondents accordingly, which reports the respondents adopted, and thereupon they gave directions to their clerk to give notice to the holders of the licences of the selected houses (which included the Running Horse) that the renewal thereof would be opposed at the general annual licensing meeting, on the grounds, in each case, that the licence was not required to meet the wants of the neighbourhood, and that the existence of the licence rendered the number of licensed houses in the neighbourhood excessive. These notices were duly served, and at the general annual licensing meeting held in February the respondents heard police evidence with regard to each particular house of the selected houses and with regard to the other licensed houses contiguous thereto, and they heard counsel and solicitors for the respective licensees. The respondents postponed their decision until the adjourned general annual licensing meeting held in March, and then resolved to refer to quarter sessions the question of the renewal of the licences of several houses,

including the Running Horse, with their report thereon. Particulars with respect to the population, the character of the neighbourhood, and as to the Running Horse and some of the nearest houses thereto, were contained in the report.

On the consideration of the respondents' report by the committee of quarter sessions the respondents appeared, and were heard on the question of the renewal of the licence for the Running Horse. Counsel for the appellants objected that the report was not made according to law, but was made by the respondents without jurisdiction, because they had delegated their duties to committees prior to the general annual licensing meeting, and had acted on those committees' reports without setting them out, or stating the facts contained therein, in their report to quarter sessions, or hearing evidence on oath as to those facts, so that the appellants had no opportunity of meeting or contradicting the facts, or assumed facts, on which the licensing justices had acted in referring the matter to quarter sessions; and, further, because there was nothing in the respondents' report to shew that the appellants' house ought to be selected as one of those to be reported to quarter sessions.

The committee of quarter sessions overruled this objection. During the hearing counsel for the appellants proposed to put, in cross-examination of a police witness called by the respondents, the following question: "Is it not the fact that there are licensed houses in the neighbourhood of the appellants' house, and doing a similar trade, the licensees of which have been convicted during the last five years for offences against the licensing laws?"

The committee of quarter sessions refused to allow this question to be put so far as it related to licensed houses the question of the renewal of the licences of which had not been referred to quarter sessions.

Counsel for the appellants further proposed to cross-examine the same witness as to whether it was not the fact that other licensed houses in the neighbourhood of the appellants' house, and doing a similar trade, were not so well conducted as the appellants' house, and generally as to the conduct and management of other licensed houses in the neighbourhood of the

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appellants' house, the question of the renewal of the licences of which houses had not been referred to quarter sessions.

The committee of quarter sessions refused to allow these questions, and in the result they decided to refuse the renewal of the licence of the Running Horse.

The questions for the opinion of the Court were :—

(1.) Whether the objections, or any of them, to the licensing justices' report were well founded.

(2.) Whether the questions proposed to be put, or the cross-examination proposed, should have been allowed.

Hohler, for the appellants. First, the renewal authority's report to quarter sessions was not made according to law, because the renewal authority acted on facts stated in a report made to them before the general annual licensing meeting by one of the committees they had appointed. The renewal authority adopted that report; they did not set it out in their own report to quarter sessions, or afford the appellants any opportunity of seeing the statistics and other particulars which appeared in it, nor did they hear evidence on oath in support of the facts stated in it. They did not, therefore, properly exercise their jurisdiction to form an opinion under s. 1, sub-s. 2, of the Licensing Act, 1904. (1)

(1) 4 Edw. 7, c. 23, s. 1 : "(1.) The power to refuse the renewal of an existing on licence, on any ground other than the ground that the licensed premises have been ill-conducted or are structurally deficient or structurally unsuitable, or grounds connected with the character or fitness of the proposed holder of the licence, or the ground that the renewal would be void, shall be vested in quarter sessions instead of the justices of the licensing district, but shall only be exercised on a reference from those justices and on payment of compensation in accordance with this Act.

"(2.) Where the justices of a licensing district, on the consideration by them, in accordance with the Licensing Acts, 1828 to 1902, of applications for the renewal of licences, are of opinion that the question of the renewal of any particular existing on licences requires consideration on grounds other than those on which the renewal of an existing on licence can be refused by them, they shall refer the matter to quarter sessions, together with their report thereon, and quarter sessions shall consider all reports so made to them and may, if they think it expedient, after giving the persons interested in the licensed premises and, unless it appears to quarter sessions unnecessary, any other person appearing to them to be interested in the question of the renewal of the licence of

The renewal authority cannot refer to quarter sessions under sub-s. 2 if the licence-holder has not been given the opportunity of being heard and giving evidence: *Rex* v. *Tolhurst and Others*. (1)

Secondly, the committee of quarter sessions ought not to have disallowed the questions proposed to be asked by the appellants' counsel, who was entitled to cross-examine the police witnesses as to other houses, not reported upon, but included among the total number which the renewal authority considered ought to be suppressed.

[He was stopped by the Court.]

Percival Hughes, for the respondents. On the first point, the renewal authority act in the capacity of objectors as well as of licensing justices. They were justified in obtaining information through the committees, and they only adopted the reports of the committees' qua objectors. It would practically be impossible to make inquiry with respect to all the licensed houses in a very populous district like this unless some such course as appointing a committee were taken. The difficulty of making such an inquiry was pointed out by Kennedy J. in *Raven and Others* v. *The Justices of Southampton*. (2) Here the licence-holder had full notice of the objections taken to the renewal of her licence. Evidence was given on oath in open Court before the renewal authority with respect to her house and the other houses near it, and she was represented by counsel and solicitors.

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those premises (including the justices of the licensing district) an opportunity of being heard, and subject to the payment of compensation under this Act, refuse the renewal of any licence to which any such report relates."

Rule 16 of the Licensing Rules, 1904, provides: "The licensee and the registered owner of any licensed premises in the case of which the compensation authority have decided to proceed under the Act, and any person who satisfies the clerk of the compensation authority that he is interested in the question of the renewal of the licence of any such premises, shall, at any time after the close of the preliminary meeting, be entitled to obtain from the clerk of the compensation authority, on payment to the clerk of a fee . . . . a copy of the part of the renewal authority's report which relates to those premises, or if in the opinion of the clerk that part cannot be conveniently extracted, a copy of the whole of the report."

(1) [1905] 2 K. B. 478.

(2) [1904] 1 K. B. 430, at p. 435.

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It may be stated, on instructions, that the report of the committee appointed by the renewal authority contained no fact with respect to the Running Horse which was not stated in the renewal authority's report to quarter sessions. The particulars as to the Running Horse were the same in both reports. The appellants were not entitled to see the private report made to the renewal authority. The renewal authority need not, in order to form an opinion under s. 1, have the same amount of evidence as would be necessary if they were deciding upon the question whether they should renew, or refuse to renew, the licence: *Rex* v. *Tolhurst and Others*. (1) On the second point, the committee of quarter sessions were right in rejecting the questions proposed to be put by the appellants' counsel. They reasonably considered the cases of all the houses within the ambit of the renewal authority's report, and it was within their discretion to determine whether the questions were material and should be put or not.

Hohler was not called on to reply.

LORD ALVERSTONE C.J. Two questions are raised in this case: the first as to the proceedings of the renewal authority in respect of their decision to refer the matter to quarter sessions, together with their report thereon, and the second as to the proceedings at the hearing of the matter before the committee of quarter sessions. On the first question I express my opinion upon the particular facts of this case; it is not necessary to discuss the points raised in *Rex* v. *Tolhurst and Others*. (2) In that case we decided that the renewal authority, before they report to quarter sessions on facts which are before them, should give the parties interested in the licensed premises an opportunity of testing or disputing those facts by being heard and giving evidence. If in this case there was any ground for supposing that in the report adopted by the renewal authority facts were stated with regard to the appellants' house upon which no opportunity of being heard had been given to the appellants, I should give effect to that objection. But the question does not really arise, especially as it seems now to be agreed that everything

(1) [1905] 2 K. B. 478, at p. 491. (2) [1905] 2 K. B. 478.

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that appeared in the report of the committee to the renewal authority was contained in the renewal authority's report to quarter sessions. There was, no doubt, a necessity that some action should be taken by the renewal authority in respect of reducing the number of licensed houses in the district. Everyone knows the difficult task which licensing justices have to perform in carrying out the Act, especially in places like Chatham, and it is important that their powers should be fettered as little as possible. I wish to say nothing which might seem to fetter their power of appointing committees for the purpose of obtaining information; but that information, if it is intended to be acted upon, ought, in my opinion, to be brought to the knowledge of the licence-holder. There are special reasons here why all the information which the renewal authority obtained should have been given to the licence-holder, because the committee had been instructed to report on a number not exceeding one-third of the total number of houses which they considered to be in excess of the requirements of the neighbourhood; so that, if the renewal authority acted on particular facts reported to them by the committee in respect of a particular one of the selected houses, it was important that the licence-holder should be given information of those facts. It appears, however, that in the committee's report to the renewal authority there were no particular facts with respect to the Running Horse which were not stated in the renewal authority's report to quarter sessions. The particulars given in that report as to the Running Horse seem to have been the same as the particulars supplied to the renewal authority by the committee they appointed. The renewal authority heard evidence with respect to each particular house selected by their committee and with respect to the other licensed houses contiguous thereto, and counsel and solicitors for the licence-holders were heard. If, therefore, the only point here was that the renewal authority had acted upon facts which they did not gather from evidence, and on which the licence-holder had no opportunity of being heard or giving evidence, I should not have been prepared to give effect to the contention for the appellants.

The second question raised in this case is more difficult.

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Sect. 1, sub-s. 2, of the Licensing Act, 1904, provides that where the justices of a licensing district "are of opinion that the question of the renewal of any particular existing on licences requires consideration on grounds other than those on which the renewal of an existing on licence can be refused by them, they shall refer the matter to quarter sessions, together with their report thereon, and quarter sessions shall consider all reports so made to them, and may, if they think it expedient, after giving the persons interested in the licensed premises . . . . an opportunity of being heard, and subject to the payment of compensation under this Act, refuse the renewal of any licence to which any such report relates." The quarter sessions, therefore, are the authority which picks out any of the houses reported to them, the renewal of the licences of which ought, in their opinion, to be refused. Here they had before them a report which related to one-third only of the houses which, in the opinion of the renewal authority, ought to be suppressed. The neighbourhood was a bad one, and there was an excess of licensed houses in it. The appellants' counsel wished to ask a police witness called by the licensing justices whether there were not licensed houses in the neighbourhood of the appellants' house, and doing a similar trade, the licensees of which had been convicted during the last five years of offences against the licensing laws. He also proposed to cross-examine the same witness as to whether other licensed houses in the neighbourhood of the appellants' house, and doing a similar trade, were not so well conducted as the appellants' house, and generally as to the conduct and management of other licensed houses, which had not been reported to quarter sessions, in the neighbourhood of the appellants' house. The committee of quarter sessions refused to allow these questions to be put. They did not reject them on the ground that the houses to which the questions related were too far off the appellants' house to make the questions material, or that the difference in the conduct of the other houses was, under the circumstances, immaterial, but upon the ground that the questions related to houses the question of the renewal of the licences of which had not been referred to them. Bearing in mind that

the committee appointed by the renewal authority had only selected one-third of the total number of houses which they considered to be excessive, and that the quarter sessions were exercising their jurisdiction to refuse the renewal of the licence, I am of opinion that the questions were proper, and ought to have been allowed on the ground that there might be other houses, not included in the renewal authority's report, which ought to have been selected for suppression rather than the appellants' house. Without wishing to fetter the discretion of the quarter sessions, in my opinion their refusal to allow the questions to be put cannot be supported, and this appeal must be allowed.

RIDLEY and DARLING JJ. were of the same opinion.

Judgment for the appellants.

Solicitors for appellants: *Ince, Colt & Ince, for Bassett & Boucher, Rochester.*

Solicitors for respondents: *Sismey & Cook, for Arnold, Baker & Day, Rochester.*

W. A.

1906
Jan. 17.

THE KING *v.* THE LICENSING JUSTICES OF THE COUNTY OF SOUTHAMPTON.

Ex parte CARDY.

Licensing Acts—Justices—Committee of Quarter Sessions acting as Compensation Authority—Power to state Case—Licensing Act, 1904 (4 *Edw.* 7, *c.* 23), *ss.* 1, 5.

The committee of quarter sessions appointed under the Licensing Act, 1904, for confirming the grants of new licences and determining any questions as to the refusal of the renewal of licences under the Act has power to state a case for the opinion of the King's Bench Division.

Rule calling upon the justices for the county of Southampton to shew cause why a writ of mandamus should not issue commanding them to hear and determine the matter of an application by one Alexander Cardy to the said justices to state and sign a special case for the opinion of the Court upon the hearing by them of the reference and report of the justices of the Southampton licensing district on the refusal to renew to the said Alexander Cardy the licence of the Yew Tree Inn at Bitterne, in the said district.

The application of Cardy for the renewal of the on-licence of the Yew Tree Inn, which was a beer-house, was referred by the licensing justices to quarter sessions, under the provisions of s. 1, sub-s. 2, of the Licensing Act, 1904, "on the ground of redundancy." It was contended before the committee of quarter sessions that this ground of objection was unintelligible and bad for uncertainty. General evidence was given before the committee of quarter sessions as to the population and number of licensed houses and their position in the district, but it was contended that there was not sufficient evidence before the committee to enable it to differentiate between the Yew Tree Inn and any other licensed houses in the district, and that the committee was not therefore entitled to refuse the renewal. Application was made to the committee to state a special case for the opinion of the Court upon these points, but the application was refused

upon the ground that the committee had no power to state a special case.

This rule was then obtained.

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Duke, K.C. (*J. A. Simon* with him), shewed cause against the rule. The committee of quarter sessions have no power to state a case. They are not exercising judicial but administrative functions. Mandamus would not lie to the Court of quarter sessions to compel them to state a case. It was always discretionary with them whether they should state a case or not. The question here, however, is whether this committee has power to state a case. The original jurisdiction of justices to state a case was contained in the commission of the peace, and gave power to consult the judge of assize when he came into the county. A practice grew up of stating the difficulty in writing and referring it to the judge of assize, and then it became the custom to decide the question conditionally, subject to the opinion of the Court of King's Bench on a case submitted to them by the justices, and this practice quite superseded the old practice of obtaining an opinion from the judge of assize. The decision had, however, always to be brought into the Court of King's Bench by writ of certiorari: *Reg.* v. *Chantrell.* (1) The Court of quarter sessions had to make an order finally deciding the appeal, and a question which did not finally dispose of the appeal would not be entertained by the Court of King's Bench: *Reg.* v. *Sutton Coldfield.* (2) The history of this jurisdiction of the Court of King's Bench is given by Lord Cairns L.C. in *Overseers of the Poor of Walsall* v. *L. & N. W. Ry. Co.* (3) But even if mandamus would have lain to the old Court of quarter sessions commanding them to state a case, it does not lie to this committee acting as the compensation authority under the Licensing Act, 1904. They are not acting under the commission of the peace; the law therefore as to stating a case does not apply. They are a statutory body created by the Licensing Act, 1904, and they are not exercising judicial functions. Even when acting under the commission of the peace the quarter sessions could

(1) (1875) L. R. 10 Q. B. 587.
(2) (1874) L. R. 9 Q. B. 153.
(3) (1878) L. R. 4 App. Cas. 30, at pp. 39, 40.

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not consult the Court of King's Bench in every case: *Rex* v. *Inhabitants of Salop.* (1) It has been held that when justices are acting in licensing matters they are not a Court: *Boulter* v. *Justices of Kent* (2), overruling *Reg.* v. *Justices of Glamorganshire* (3), in which the contrary was held. The justices, in acting under the Licensing Act, 1904, are acting, not under the supervision of the Court of King's Bench, but under that of the Secretary of State: Licensing Act, 1904, ss. 6 and 7. Licensing justices have no power to state a case on the question of a game licence: *Reg.* v. *Bird.* (4)

[LORD] ALVERSTONE C.J. referred to *Hagmaier* v. *Willesden Overseers.* (5)]

Pickford, K.C. (*Temple Cooke* with him), in support of the rule. The committee of quarter sessions, acting under s. 5 of the Licensing Act, 1904, have power to state a case. The Court have recently dealt with a case stated by such a committee: *Morgan* v. *Justices of Aylesford.* (6) The expression "quarter sessions" in the Act is defined by s. 9, sub-s. 4, as meaning the Court of quarter sessions, and if it is a Court it has all the powers of a Court, including the power of stating a case for the opinion of the King's Bench Division. The committee here refused jurisdiction and declined to exercise their discretion at all, holding that they had no power to state a case. Mandamus will therefore lie to them to consider whether on the facts they should state a case or not. The Court of quarter sessions is not like the licensing justices. It acts by making an order, and, though that order may be made subject to the opinion of the King's Bench Division on a case stated, it is always a final order. The power given by the Licensing Act, 1904, to the quarter sessions is merely a new jurisdiction given to an existing Court, and, as James L.J. said in *Dale's Case* (7), "If a new jurisdiction is given to an existing Court—that is to say, a jurisdiction to deal with some new matters in a different mode and with a different procedure . . . . it must, unless the contrary be expressly or

(1) (1810) 13 East, 95.
(2) [1897] A. C. 556.
(3) [1892] 1 Q. B. 621.
(4) (1898) 62 J. P. 309.
(5) [1904] 2 K. B. 316.
(6) Ante, p. 437.
(7) (1881) 6 Q. B. D. 376, at p. 450.

plainly implied, be given to that Court to be exercised according to its general inherent powers of dealing with the matters which are within its cognizance."

The licensing justices no doubt are not acting judicially in sending the report to quarter sessions, but they have no power to grant or refuse the renewal of the licence on grounds other than the specified grounds, but must, if they think the question of the renewal needs consideration on those other grounds, refer the matter to quarter sessions, who must act judicially, and though they have power to delegate their authority to a committee, that committee must also act judicially.

[He was stopped.]

LORD ALVERSTONE C.J. I am of opinion that this rule should be made absolute. I express no opinion as to the circumstances under which the quarter sessions ought to state a special case, or the grounds on which they ought to entertain an application for a special case. In this case the justices decided that they could not entertain the application for a case because they had no power to state it. The question which we have to decide, therefore, is, Does the tribunal which is dealing with the question of the renewal of a licence under the Act of 1904 possess the power to state a special case? I should have thought that, if it is acting judicially, the point scarcely admitted of argument, because it has been for a very long time recognized that if an order is made by quarter sessions which embodies statements so as to make it a speaking order, and it is a final order one way or the other, then the Court of King's Bench can look at the whole of the order and say whether it ought to stand or ought to be quashed. Since the decision in *Reg.* v. *Sutton Coldfield* (1) it has, I think, never been doubted that the Court of King's Bench will not entertain special cases where there will not be a final order, determining the matter, one way or the other, depending on the view they take of the special case.

Therefore the real point of this case is, Is the committee of the quarter sessions, acting under the powers of the Act of 1904, giving a judicial decision or is it not? It was contended that

(1) L. R. 9 Q. B. 153.

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the committee of quarter sessions is in the position of the licensing justices, that therefore the reasoning in *Boulter's Case* (1) applies, and that the committee ought to be considered as exercising delegated administrative jurisdiction, reporting to the Home Secretary as to how its powers had been carried out, and that the decision that it gave ought not to be regarded as being the proceeding of a Court or a judicial proceeding at all. In my opinion that is too narrow a view to take of the functions of the committee. It is quite true that the Act of 1904 recognized that the grounds on which the licensing justices could refuse the renewal of licences were limited to certain specified grounds. Sect. 1, sub-s. 2, of the Act then said that, where the justices "are of opinion that the question of the renewal of any particular licence requires consideration on grounds other than those" which I have mentioned, they were to refer the matter to quarter sessions, together with their report. We must start from that point and see what quarter sessions have got to do. They have to consider the report, and may "after giving the persons interested in the licensed premises and, unless it appears to the quarter sessions unnecessary, any other persons appearing to them to be interested in the question of the renewal of the licence of those premises (including the justices of the licensing district), an opportunity of being heard and, subject to the payment of compensation under this Act, refuse the renewal of any licence to which any such report relates." In my opinion, looking at that statute and the nature of the question raised, and the directions as to the duty of the quarter sessions, it is certainly in the nature of a judicial proceeding. I do not attach any great importance to a mere definition clause, still it is quite plain that the body spoken of as quarter sessions is meant to be the Court of quarter sessions of the county; that is not conclusive, because it might well be that the Court of quarter sessions was not acting in a judicial capacity, but was doing something similar to that which—as in the case of *Hagmaier* v. *Willesden Overseers* (2), where they were settling the jury lists—did not enable them to state a case.

Further, the provision in the 5th section of the Act of 1904,

(1) [1897] A. C. 556. (2) [1904] 2 K. B. 316.

that quarter sessions shall delegate their powers of dealing with the renewal of licences under the Act to a committee, seems to me to shew that the lesser body, the committee to whom the duty is delegated are exercising the powers of quarter sessions. That being so, I come to the conclusion that upon such an inquiry so conducted, and such a decision, it is an instance of a new jurisdiction being given to a Court to act through a committee of its members, and that the principle applies that where a new jurisdiction is given to a Court, prima facie that Court is to exercise that jurisdiction in accordance with all its ordinary powers. It seems to me that, subject to the committee of quarter sessions exercising their discretion on the application on the merits, they had the power to either state a special case or to frame an order stating such facts as would make it a speaking order, and would enable this Court to exercise a judgment on the question whether or not the order was good or bad. On the sole ground, therefore, that the committee have declined to act, because they were of opinion they had no power to state a case, I must hold that the view they took of their jurisdiction was too limited, and that this rule must be made absolute.

It seems to me that *Boulter's Case* (1) really does not help us on this particular case. It was held that the licensing justices were not a Court, and that quarter sessions had no power to make the objector to the renewal of a licence pay costs because he was not a party to any lis. That decision does not seem to me to give us much assistance in coming to the conclusion as to what is the true view to take of the committee of quarter sessions, when they are exercising the jurisdiction conferred on them by sub-s. 2 of s. 1 of the Licensing Act, 1904.

RIDLEY J. I agree with my Lord for the reasons which he has given.

DARLING J. I am of the same opinion, but I should like, as this is an important case, to give my own reasons. The question arises because of the passing of the Licensing Act of 1904. The

(1) [1897] A. C. 556

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1st section of that Act effects a transfer, from the licensing justices to the quarter sessions, of the power to refuse the renewal of certain licences, and the body to which that power is transferred is always spoken of, throughout the Act of 1904, as the "quarter sessions." In s. 9, sub-s. 4, that term is defined, "The expression 'quarter sessions' means, as respects a county, the Court of quarter sessions for that county."

Now that being so, we must take it that the powers are transferred to the Court of quarter sessions. I had some little doubt at one time because of two matters. Sect. 5 in sub-s. 5 enacts that, "The justices of any borough, not being a county borough but having a separate commission of the peace, shall be entitled to appoint one of their number to act, with reference to the determination of any question as to the refusal of the renewal of a licence under this Act, and any matters consequential thereon, on the committee appointed under this section by quarter sessions." Now, as it appears to me, under that subsection the justice so appointed does not exactly become a member of the Court of quarter sessions. He is not appointed to the whole quarter sessions, but he does become a member of the committee to which the Court of quarter sessions is, by s. 5, sub-s. 2, allowed to delegate its powers of renewing or refusing licences.

Another point which pressed upon me a little was that, in s. 6 of this Act, the Secretary of State is given power to regulate the procedure of quarter sessions, and because quarter sessions means a Court of quarter sessions, the Secretary of State is given power to regulate the procedure of the Court of quarter sessions. Now, of course, it is not usual to give the Secretary of State power to regulate the procedure of Courts of justice, but the Legislature can do it if the Legislature chooses, and it has distinctly chosen to do so, as is plain when s. 6 and the definition of quarter sessions in s. 9, sub-s. 4, are read together.

I come to the conclusion, therefore, that, notwithstanding these objections, this body, to which the renewal and refusal of licences is transferred, is the Court of quarter sessions; but I also come to the conclusion that although they remain a Court, new duties

and new powers have been imposed upon them as a Court of quarter sessions. What a Court of quarter sessions could do is very precisely explained by Lord Cairns in the *Walsall Case* (1), and it results from that, that the Court of quarter sessions may state a case. That was the way in which they had long exercised the power which they possessed originally of consulting with the judge of assize, and, later, of consulting with the judges of the Court of King's Bench. Of course, they could not come to see the judges of the Court of King's Bench, who were sitting in London. The judges of the Court of King's Bench did not go down to the country except as judges of assize, and therefore, if they wished to consult them, they must consult them in writing, and it became the practice to consult them by means of stating a case. It is erroneous to suppose that when they stated a case they did not make an order. Lord Cairns says there were these two manners in which the advice and assistance of the judges might be taken by the Court of quarter sessions. The one was consultative simply, and the Court of quarter sessions retained its jurisdiction over the case. And he says: "But supposing that the Court of quarter sessions did not adopt that course, there was still another mode by which any question of law which appeared to the Court of quarter sessions doubtful might be left open for the exercise of the judgment of a higher tribunal. All that was necessary was that the Court of quarter sessions, in making its order, should not make it an unspeaking or unintelligible order, but should in some way state upon the face of the order, the elements which had led to the decision of the Court of quarter sessions. If the Court of quarter sessions stated upon the face of the order, by way of recital, that the facts were so and so, and the grounds of its decision were such as were so stated, then the order became upon the face of it a speaking order; and if that which was stated upon the face of the order, in the opinion of any party, was not such as to warrant the order, then that party might go to the Court of Queen's Bench and point to the order as one which told its own story, and ask the Court of Queen's Bench to remove it by certiorari, and, when so removed, to pass judgment upon it whether it should or should

(1) L. R. 4 App. Cas. 30, at p. 40.

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Darling J.

not be quashed. In that case, as I said just now, the jurisdiction of the Court of Queen's Bench was merely a jurisdiction to leave the order standing or to remove it out of the way"; and he points out what is really the difference between a Cour d'Appel and a Cour de Cassation. In the one case there is an appeal, and in the other the Court simply deals with the order of the Court below by quashing it. The order might take that form, now called a special case, and that was what was asked for here. The committee of quarter sessions refused, because they held that they had no jurisdiction to state a special case.

I think they were wrong. I think that they were a Court of quarter sessions; that they had the power to make an order in the form of a special case, and, therefore, to make such an order as was asked for. They were not, in my opinion, bound to state a special case, but they were bound to make an order, and, as they had power to make an order in the form of a special case, they were wrong in saying they had no power to make an order, which is what they did say.

I should like to point out that even when a special case is stated and sent up to this Court, there is still an order, although it is an order which takes the form of a special case. It is a mistake to suppose that there is not an order; there is, and not only so, but when a special case came to this Court there always had to be a certiorari to bring up the order, and the special case with it, until the Summary Jurisdiction Act of 1879, in s. 40, said this: "A writ of certiorari or other writ shall not be required for the removal of any conviction, order or other determination, in relation to which a special case is stated by a Court of general or quarter sessions for obtaining the judgment or determination of a superior Court." But until that time the order and the special case did not come to this Court except by means of a certiorari, and there is still an order, although the section which I have just read obviates the necessity for a certiorari to bring that order in this Court. Therefore I think that when the quarter sessions were asked to state a special case they were asked to make an order which they could have made, in a form in which they could have made it, and they refused to exercise jurisdiction wrongfully when they said that they had no jurisdiction

to make it. For these reasons I think the rule should be made absolute.

LORD ALVERSTONE C.J. I wish to say a word about that case of *Morgan* v. *Aylesford*. (1) The point that no special case could be stated was not raised in that case, and, of course, so far as the question of jurisdiction is concerned, this decision governs that; but it may be that in that case there was no final order. I do not know how that was, but it must not be taken that in *Morgan* v. *Aylesford* (1) we meant to decide any point inconsistent with the existing law. We do not entertain a special case where there is not a final order. We did not in any way intend to depart from the practice which was recognized in the *Sutton Coldfield Case*. (2)

Rule absolute.

Solicitors for applicants: *Speechly, Mumford & Co., for Lamport, Bassitt & Hiscock, Southampton.*

Solicitors for respondents: *Robbins, Billing & Co., for H. Barber, Winchester.*

(1) Ante, p. 437.

(2) L. R. 9 Q. B. 153.

A. P. P. K.

1906
Feb. 16.

SOUTH BRITISH FIRE AND MARINE INSURANCE COMPANY OF NEW ZEALAND *v.* DA COSTA AND OTHERS.

Insurance (Marine)—Reinsurance—"Excess" Policy—Craft Risk—"Each Craft to be deemed a separate Insurance"—Loss in Craft—Calculation of Excess.

The plaintiff company, having insured a cargo of wheat to the extent of 1914*l.*, reinsured with the defendants by a policy for "1000*l.* excess of 500*l.*" Both the original and the reinsurance policies covered risk of craft, and contained a clause that each craft was "to be deemed a separate insurance." Owing to the sinking of a craft containing a portion of the cargo a loss occurred which the plaintiff company sought to recover from the defendants under the reinsurance policy. The interest of the plaintiff company in the cargo in the particular craft did not amount to 500*l.*, and the defendants repudiated liability on the ground that, as each craft was to be deemed a separate insurance, there had been no loss of any "excess of 500*l.*":—

Held, that the clause had no application to the circumstances of the case; that the "excess" for which the defendants were liable ought to be calculated on the value of the plaintiff company's whole interest at risk, and not on the company's interest in the particular craft only; and that the defendants were therefore liable for their proportion of the loss.

ACTION in the commercial list tried by Bigham J. without a jury.

The plaintiff company claimed to recover a loss on a policy of reinsurance subscribed by the defendants and other underwriters at Lloyd's. The facts were as follows:—An insurance was effected with the plaintiff company by a policy expressed to be for "1914*l.* on 224,000 poods of wheat, including 200*l.* freight and advances, subject to clauses as attached" per steamship *Whinfield* from Ghenitschesk to Barrow-in-Furness, warehouse to warehouse. The clauses attached to the policy included the following, which were headed "Special F. P. A. Clause":—

"Including all risks of craft $\frac{\text{and}}{\text{or}}$ raft $\frac{\text{and}}{\text{or}}$ of any special lighterage (each craft, raft, ~~package,~~ or lighter to be deemed a separate insurance) of fire, transhipment, landing, warehousing and reshipment, if incurred, and whilst waiting shipment $\frac{\text{and}}{\text{or}}$ reshipment and all other risks and losses by land and water from the time of

leaving the warehouse at point of departure until safely delivered into the warehouse or other place for which the goods have been entered or in which it is intended they shall be lodged, whether previously discharged or landed elsewhere within the port or place of destination or not, with or without recourse against lighterman.

"Warranted free from particular average under 3 per cent., unless the ship or craft or cargo be stranded, sunk, on fire, or in collision or in contact with ice or some substance other than water (the collision or contact to be of such a nature as may reasonably be supposed to have caused or led to damage to cargo): but to pay landing, warehousing, forwarding, and special charges, if incurred, also partial loss arising from transhipment."

The plaintiff company effected two policies of reinsurance, one for 500*l.*, and another, being the one subscribed by the defendants, which was expressed to be a policy of reinsurance of the plaintiff company for "1000*l.* excess of 500*l.*" "warranted f. p. a., &c., as per clause attached." The attached clauses were in the same terms as those attached to the original policy, set out above, with the exception that in the latter clause the words "under 3 per cent." had been struck out.

The reason why the reinsurance policy was for "1,000*l.* excess of 500*l.*" was that in the first instance when the insurance was undertaken by the plaintiff company and the reinsurance was effected it was not known what would be the exact amount of the plaintiff company's interest, the "slip" merely stating the insurance to be for "2000*l.* provisional." The insurance was subsequently closed for 1914*l.*, and the policies were then issued for that sum.

During the currency of the risk a lighter at Ghenitschesk containing 33,060 poods of wheat, being part of the cargo destined for the *Whinfield*, sank. The total amount of the plaintiff company's risk in respect of the contents of this lighter was 400*l.*, and the proportion of the company's loss incurred by the sinking of the lighter was 298*l.* 12*s.* 10*d.*, the whole amount of the loss being 3882*l.* The plaintiff company having paid 298*l.* 12*s.* 10*d.* as a loss under the original policy, sought in this action to

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recover from the defendants under the reinsurance policy their proportion of this sum.

The defence to the action was that as by the clause in the reinsurance policy each lighter was "to be deemed a separate insurance," and as the plaintiff company's liability in the wheat on the lighter did not exceed 500*l.*, the plaintiff company had no "excess" attaching to the reinsurance.

F. D. Mackinnon (*J. A. Hamilton, K.C.*, with him), for the plaintiff company. The reinsurance policy subscribed by the underwriters is identical in its provisions with the original policy, except that the reinsurance is free from particular average, whereas the original policy was only free from particular average under 3 per cent., and the intention of the parties clearly was that the plaintiff company should be indemnified against all liability on the original policy over 500*l.* and up to 1500*l.*, and amongst the risks covered "all risks of craft, &c.," are expressly included. The contention of the defendants that the effect of the words "each lighter to be deemed a separate insurance" is to prevent there being any excess of 500*l.* unless the interest of the plaintiff company in any one lighter exceeded 500*l.*, would almost entirely defeat this intention, because, in practice, that would hardly ever be the case.

Further, the clause, which is a common form, usually contains the word "package," though in the present case that word was struck out, the cargo being in bulk; and if the defendants' contention be sound, it would equally apply in the case of a package, but the suggestion that an "excess" policy would not cover the loss of a package unless the interest of the assured in the particular package reached the excess amount is one which cannot seriously be entertained. The "craft" clause really has no application to the circumstances of this case. Its object is twofold: First, the fact that each lighter is to be deemed a separate insurance prevents a loss of the whole contents of a lighter from being a particular average loss; secondly, where the policy is warranted free from particular average under 3 per cent., the percentage, in the case of a particular average loss in craft, has to be calculated on the value of the cargo in the craft, and not on the whole amount of the shipment.

Scrutton, K.C. (*M. Hill* with him), for the defendants. By the reinsurance policy the defendants have agreed to reinsure the plaintiff company to the extent of 1000*l.* excess of 500*l.*; they have not reinsured 1000*l.*, part of 1500*l.*; and the defendants' liability, therefore, did not arise until the plaintiff company had at risk more than 500*l.* The company's interest in the cargo of the lighter did not amount to 500*l.*, and therefore, since the policy expressly stipulates that each craft is to be deemed a separate insurance, there was no excess to which the defendants' policy could attach. The argument founded on the suggested result of this defence cannot be relied on as an answer to the express terms of the policy, but even if it did result from the defendants' contention that, practically, all craft risks would be excluded, which it is not admitted would be the case, that must be regarded as the necessary consequence of the language which the parties have chosen to use in the reinsurance policy, and that result could have been prevented by inserting in the policy one of the special clauses applicable to excess insurances which are frequently used by underwriters and insurance companies to avert those very consequences which will arise in this case. The plaintiff company can only succeed in this action by striking out of the policy the words "each craft to be deemed a separate insurance," and no reason has been, or can be, given for doing so.

BIGHAM J. In this case the plaintiff company seeks to recover a loss under a policy of reinsurance. It appears that there was proposed to the plaintiff company an insurance on wheat from Ghenitschesk to a port in the United Kingdom, the risk to be from warehouse to warehouse. It was not known at that time what was the exact value of the cargo, and the interest which the plaintiff company was to undertake was provisionally stated to be 2000*l.*, the actual sum to be ascertained later. The plaintiff company desired to reinsure part of the risk, and a reinsurance was effected at Lloyd's with certain underwriters, including the defendants, of "1000*l.* excess of 500*l.*" That means, as I understand it, that if it should turn out that the plaintiff company had an interest under the original policy

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Bigham J.

in an amount exceeding 500*l.*, the reinsurers were to relieve the company from the amount of the excess up to 1000*l.* The value of the cargo was subsequently ascertained, and the interest insured by the plaintiff company was fixed at 1914*l.*, for which sum policies were issued. Then a loss of part of the cargo occurred through the sinking of a barge containing wheat to the value of over 3000*l.* which was being conveyed to the steamer. It is agreed that that is a loss which falls on the plaintiff company amongst others under the original policy. The company has paid its share of the loss, amounting to 298*l.* 12*s.* 10*d.*, and now seeks to recover from the defendants under their reinsurance policy their proportion of that sum.

The defendants deny that they are liable, and base their defence on a clause attached to the reinsurance policy which is headed, "Special F. P. A. Clause," and the material part of which is in these terms: "Including all risks of craft $\frac{\text{and}}{\text{or}}$ raft $\frac{\text{and}}{\text{or}}$ of any special lighterage (each craft, raft or lighter to be deemed a separate insurance)." It is said for the defendants that the amount which the plaintiff company had at risk on this particular barge did not exceed 500*l.*, and that, inasmuch as each craft is to be deemed a separate insurance, there was no excess beyond 500*l.*, and that the defendants therefore are not liable. The question, in my opinion, depends on whether the words which I have just read, being the first words of this so-called f. p. a. clause, apply at all to the circumstances of this case. It is well known that in policies of marine insurance, as well as in charterparties and other like documents, there are to be found all sorts of provisions and clauses which may or may not be applicable to the particular contract. It must also be remembered that this policy is a contract of reinsurance, and, therefore, primarily intended to indemnify the plaintiff company pro rata against any liability which might arise under the original policy. It is necessary, therefore, to consider whether these words do relieve the defendants from liability for the loss in this case which, being a loss in craft, was one of the risks expressly included by this same clause. I had always held the view, which is confirmed by the evidence of the witnesses called for the plaintiff company, that these words were inserted in the clause solely with reference to claims for

particular average losses, and that their meaning and application is, that if a craft containing part of the subject-matter of the insurance is lost, the craft shall be treated as if it were the subject of a separate insurance, so that although a part only of the whole cargo has been lost it shall be paid for as if the loss were a total and not a particular average loss. There is another case of particular average to which the clause is applicable, and that is where the underwriter is not to be liable for a particular average loss unless it exceeds 3 per cent. of the whole cargo. There might be a loss in craft which did not amount to anything like 3 per cent. of the whole cargo, but if the craft is treated as a separate insurance for the purpose of ascertaining the 3 per cent., then the loss might be considerably in excess of 3 per cent. of the contents of the craft, and in that case the underwriters would have to pay a particular average loss. In my opinion this clause is inserted with reference to those considerations, and to those considerations alone, and it ought not to be read, and would not be read in ordinary business by underwriters or by merchants, as in any way affecting this contract of re-insurance. The defendants, therefore, in the circumstances of this case, are not entitled to rely on the clause as an answer to the claim, and there must be judgment for the plaintiff company for the amount claimed.

Judgment for the plaintiff company.

Solicitors for the plaintiff company: *Waltons, Johnson, Bubb & Whatton.*

Solicitors for the defendants: *Thomas Cooper & Co.*

F. O. R.

C. A.
1906
Feb. 16.

[IN THE COURT OF APPEAL.]

THE DARTFORD BREWERY COMPANY, LIMITED *v.* MOSELEY.

Practice—Costs—Writ of Possession—Order for Costs—Jurisdiction to make Order—Judicature Act, 1890 (53 *&* 54 *Vict. c.* 44), *s.* 5.

The issue of a writ of possession, in pursuance of a judgment for possession of premises, is a proceeding in the Supreme Court, and the costs of and incident thereto are in the discretion of the Court or judge under s. 5 of the Judicature Act, 1890.

Appeal from an order of A. T. Lawrence J. made at chambers.

The action was brought to recover possession of premises, and for rent and mesne profits, upon the expiration of the defendant's tenancy. An application was made under Order xiv. that the plaintiffs should be at liberty to sign judgment for possession, with the costs of the application, and an order to that effect was made, the claim for rent standing over. Judgment was accordingly signed, and a writ of possession was applied for and issued, under which the plaintiffs obtained possession of the premises. The plaintiffs thereupon took out a summons for an order that the costs of and incident to the issue of the writ of possession, issued in pursuance of the judgment, should be taxed and paid by the defendant to the plaintiffs. The master refused the application, but on appeal the learned judge made an order as prayed.

The defendant appealed.

C. Tindale Davis, for the defendant. The plaintiffs are not entitled to the costs of the writ of possession. There is nothing in any of the antecedent orders made in the action which relates to such costs, and further there is no rule or statute dealing with them. The costs of a writ of fieri facias are not a debt: *Salisbury* (*Marquis of*) v. *Ray* (1); *In re Long* (2); but they can be added to the costs of the sheriff under Order xlii., r. 15, which follows s. 123 of the Common Law Procedure Act, 1852, but there is no equivalent to this in Order xlvii., which deals with writs of possession. The issue of such a writ is not a proceeding

(1) (1860) 8 C. B. (N.S.) 193. (2) (1888) 20 Q. B. D. 316.

in the Supreme Court within s. 5 of the Judicature Act, 1890, the execution of such a writ being merely a ministerial matter, and it follows that the costs incurred cannot be made the subject of an order under that section. It should also be noted that the form given for a writ of possession contains no reference to the costs of the writ. The costs referred to in form 7 are the costs of matters other than the writ of possession, in cases in which the successful party issues one writ of execution for all the matters involved, as he may under Order XLVII., r. 3.

J. R. Atkin, for the plaintiffs. The application for a writ of possession was made in the action and is so headed, and all that followed was in connection with that writ in the High Court, and the jurisdiction of the Court was exercised because the issue of the writ is a proceeding in the Court. The absence of any special provision as to the costs of the writ arises from its nature, for the property to be transferred by it cannot be charged, as in the case of a writ of fieri facias, for the charge would fall on the plaintiff's own property. There is no question as to a levy of costs, but the point is whether an order can be made for the costs. Even if there were no general jurisdiction in the Courts to deal with such costs the decision in *In re Fisher* (1) shews that s. 5 of the Judicature Act, 1890, was intended to give such a jurisdiction in every proceeding in the Supreme Court not otherwise dealt with by statute or rule.

C. Tindale Davis, in reply.

VAUGHAN WILLIAMS L.J. It is desirable in this case to set out clearly what were the proceedings up to the time of the order of the learned judge which is appealed from. There was a writ of summons issued on November 21, 1905, in which the plaintiffs claimed possession of a house and premises, and rent and mesne profits were also claimed, the position of the defendant being that he had been in possession of the premises as tenant to the plaintiffs under a tenancy that had expired. The plaintiffs were enabled, under the increased powers arising from the extension of Order XIV. to an action by a landlord against a tenant to recover possession of premises on the expiration of the tenancy, to make

(1) [1894] 1 Ch. 450.

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application for summary judgment under that order. They accordingly did so, and on December 15 an order was made on that application that the plaintiffs should be at liberty to sign final judgment against the defendant for possession of the premises set out in the indorsement of the writ of summons, with the costs of the application, the claim for rent standing over. On December 16 final judgment was signed which recited that the plaintiffs had obtained the order of the previous day, and adjudged that the plaintiffs should recover possession of the premises, and should recover the costs of the application to be taxed. Up to that time no mention had been made in the proceedings, or in the judgment, of the costs of a writ of possession. The plaintiffs on December 20 applied for and obtained a writ of possession, and, being desirous to recover the costs of issuing this writ, they applied on December 29 for an order that the costs of and incident to the writ of possession should be taxed and paid to them by the defendant. The master refused to make an order to that effect, but on appeal A. T. Lawrence J. set aside the order of the master dismissing the summons, and made an order in the terms of the application. Against that order of the learned judge the defendant has appealed.

It appears to be clear that up to the Judicature Acts, and indeed up to the year 1890, there would have been no jurisdiction to make this order. I have looked at the old forms applicable to proceedings for the recovery of possession, and have referred to Watson on Sheriffs, a book of considerable authority, and they shew that formerly there was no jurisdiction to make such an order. But in 1890 the Judicature Act of that year was passed, and s. 5 of that Act is in these terms: "Subject to the Supreme Court of Judicature Acts, and the rules of Court made thereunder, and to the express provisions of any statute, whether passed before or after the commencement of this Act, the costs of and incident to all proceedings in the Supreme Court, including the administration of estates and trusts, shall be in the discretion of the Court or judge, and the Court or judge shall have full power to determine by whom and to what extent such costs are to be paid." That section has been relied on, and I think properly relied on, as giving jurisdiction to make the order appealed

against. I confess that on reading the words of the section I was not quite sure that it was intended to give power to the Court to order payment of costs that could not have been ordered to be paid before the Judicature Acts. Stirling L.J., however, called attention to the case of *In re Fisher* (1), and when one looks at the observation of Lindley L.J. in giving judgment it seems that the object of s. 5 of the Act of 1890 was to confer jurisdiction in cases where it had not previously existed. The learned Lord Justice, after dealing with the unfortunate state of the law up to a certain time, and to an attempt to get over the difficulty in the case of *Ex parte Mercers' Co.* (2), continued: "However, in *In re Mills' Estate* (3) that case was not followed, and the reason why it was not followed was that the Court held that no jurisdiction was conferred upon it by the rules to order the payment of costs in cases where before the Judicature Act it would have had no power to do so. That difficulty was felt to be one that ought to be got rid of by legislation, and s. 5 of the Judicature Act, 1890, was passed for the purpose, amongst other things, of getting rid of what was admitted to be an unjust anomaly." When we know from that case that s. 5 was intended to confer jurisdiction to order costs, in cases where the power to do so did not exist before, we must look to the terms of the section to see whether the power so to order is conferred in this case. The section applies to "the costs of and incident to all proceedings in the Supreme Court" not dealt with by statute or rules. It was argued that a writ of possession was not a proceeding in the Supreme Court, but I am of opinion that it is such a proceeding, and that the order of the learned judge was within his jurisdiction, and that the appeal must be dismissed.

STIRLING L.J. I agree.

Appeal dismissed.

Solicitors for plaintiffs: *Nicholson, Graham & Beesley.*
Solicitors for defendant: *Morris & Rickards.*

(1) [1894] 1 Ch. 450. (2) (1879) 10 Ch. D. 481.
(3) (1886) 34 Ch. D. 24.

A. M.

1906
Jan. 11.

COWLING *v.* TOPPING.

Justices—Jurisdiction—Industrial Assurance Company—Disputes—Collecting Societies and Industrial Assurance Companies Act, 1896 (59 & 60 *Vict.* c. 26), *ss.* 1, 7—*County Court Jurisdiction.*

By s. 1 (*b*) of the Collecting Societies and Industrial Assurance Companies Act, 1896, that Act applies to industrial assurance companies granting policies of life assurance for a less sum than 20*l.*, and receiving premiums by means of collectors at a greater distance than ten miles from the registered office or principal place of business of the company at less periodical intervals than two months. By s. 7 disputes between an industrial insurance company and a member or person insured or a person claiming through him may be settled by the county court or by a court of summary jurisdiction:—

Held, that the jurisdiction of a county court or court of summary jurisdiction was limited to disputes arising with regard to policies originally granted for a less sum than 20*l.*

Quære, whether an industrial assurance company issuing policies for 20*l.* and upwards, as well as policies for sums less than 20*l.*, comes within the provisions of s. 7, so as to give any jurisdiction over disputes to a county court or court of summary jurisdiction.

Case stated by justices for St. Helens.

A complaint had been laid by the respondent, Eliza Topping, against the London, Edinburgh and Glasgow Assurance Company (who were represented by the appellant), under the provisions of the Collecting Societies and Industrial Assurance Companies Act, 1896, and the Friendly Societies Act, 1896, her claim being as executrix of the will of her deceased husband, John Topping, upon a policy of insurance for 22*l.* 19*s.*, taken out by him with the appellant company in October, 1900, upon his own life. At the hearing before the justices it was contended (inter alia) on behalf of the appellant that the justices had no jurisdiction under ss. 1 and 7 of the Collecting Societies and Industrial Assurance Companies Act, 1896, to hear the application.

By s. 1 of that Act (59 & 60 Vict. c. 26): "This Act shall apply to every such (*a*) friendly society or branch, whether registered or unregistered (in this Act referred to as a collecting society); and (*b*) person or body of persons, whether corporate or unincorporate, granting assurances on any one life for a less

sum than 20*l.* (in this Act referred to as an industrial assurance company), as receives contributions or premiums by means of collectors at a greater distance than ten miles from the registered office or principal place of business of the society or company, and, in the case of an industrial assurance company, at less periodical intervals than two months."

By s. 7: "In all disputes between a collecting society or industrial assurance company and any member or person insured or any person claiming through a member or person insured, or under the rules, that member or person may, notwithstanding any provisions of the society or company to the contrary, apply to the county court or to the court of summary jurisdiction for the place where that member or other person resides, and the court may settle that dispute according to the provisions of the Friendly Societies Act, 1896."

The justices were of opinion that the words "granting assurances on any one life for less than 20*l.*" in s. 1 (*b*) had the effect of bringing the appellant company (a society which granted such assurances) within the denotation of the term "industrial assurance companies," and so made the procedure in disputes between members and the company subject to s. 7 of the Act; they therefore held that they had jurisdiction, and that their jurisdiction was not limited to amounts under 20*l.*, and made an order in favour of the respondent for the amount claimed. The company appealed. (1)

S. T. Evans, K.C. (*F. Dodd* with him), for the appellant. The justices had no jurisdiction to entertain the application; their jurisdiction is at any rate confined to disputes regarding policies issued for a less sum than 20*l.* It may be possible by a strict and literal interpretation of the language of s. 1 to extract the meaning contended for by the respondent, but it would be contrary to the whole spirit of legislation on the subject to hold that where a society issues policies, as the appellant society does, for 2000*l.* and upwards, a county court judge or court of summary

(1) Other facts were stated, and other questions were raised, in the case, but were not argued on the appeal, which proceeded solely on the question of jurisdiction.

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jurisdiction can adjudicate upon disputes as to any of its policies. The intention of the Legislature was merely to give jurisdiction in small cases involving less than 20*l.* This is the view taken in Baden Fuller on Friendly Societies, 2nd ed. p. 148, though a contrary opinion is expressed in Stone's Justices' Manual, 37th ed. p. 361, note (*c*). Further, it may be contended that a society which issues policies for 20*l.* and upwards does not fall within s. 7 at all, even in respect of policies for a less amount than 20*l.*, but it is unnecessary to argue that point in the present case.

Ross Browne, for the respondent. The justices were right in holding that they had jurisdiction to entertain the complaint. The language of the statute is perfectly plain, and admits of only one interpretation. When once such an assurance company issues policies of assurance for an amount under 20*l.*, it becomes an industrial assurance company within the meaning of the Act, and a county court judge or a court of summary jurisdiction has jurisdiction to settle disputes in respect of all policies issued by it, whether for amounts under or over 20*l.* Assurance companies which do business of that class must take the consequences of being industrial assurance companies within the meaning of the statute.

LORD ALVERSTONE C.J. I am clearly of opinion that the objection to the jurisdiction of the justices must prevail. The Act of 1896 conferred upon county courts and courts of summary jurisdiction a special jurisdiction over disputes between these societies, on the one hand, and their members, or persons claiming through their members, on the other. It is, I think, plain from a consideration of a long course of legislation upon kindred subjects that the intention of the Legislature in conferring this jurisdiction was to confine it to claims on policies for small amounts, that is, to policies for amounts under 20*l.*; the analogy of other statutes shews that a limit is always imposed upon jurisdiction of this nature. The language of s. 1 (*b*) of the Act under consideration is that the Act is to apply to every person or body of persons, corporate or incorporate, "granting assurances on any one life for a less sum than twenty pounds."

It is contended on behalf of the respondent that this provision means that, if a society chooses to grant assurances for a less sum than 20*l.* the mere fact of its doing so clothes the justices with jurisdiction to decide all claims upon policies issued by the society, whatever may be the amount insured by the policy. I do not deny that it is possible to read the language of the section in that way, but such an interpretation would be contrary to the whole spirit of legislation on the subject, and it would be a strange way of depriving these societies of their rights under the ordinary law of the land. I prefer the construction of the section which confines this jurisdiction to claims in respect of policies originally granted for a less sum than 20*l.* A question may arise whether societies which grant policies for 20*l.* and higher amounts are not altogether outside this jurisdiction, but it does not arise in the present case; and I am of opinion, whatever view may be taken of that question when it is ripe for decision, that this jurisdiction is at any rate limited to policies for sums less than 20*l.* I think, therefore, that the justices had no jurisdiction to entertain the proceeding, and that this appeal must be allowed.

RIDLEY and DARLING JJ. concurred.

Appeal allowed.

Solicitors for appellants: *Wynne-Baxter & Keeble.*

Solicitor for respondent: *H. V. Baines, for Swift & Gardner, St. Helens.*

W. J. B.

1906
Jan. 11.

MAYOR, &c., OF WANDSWORTH *v.* BAINES.

London—Removal of House Refuse—Failure of Sanitary Authority to remove —Reasonable Cause—Public Health (London) Act, 1891 (*54 & 55 Vict. c.* 76), *s.* 30.

By a by-law of the London County Council, made under s. 16 of the Public Health (London) Act, 1891, it was provided that, where a sanitary authority arranged for the daily removal of house refuse in their district or in any part of it, the occupier of any premises therein should, at such hour of the day as the sanitary authority should fix and notify by public announcement, deposit on the kerbstone or outer edge of the footpath immediately in front of the house or in a conveniently accessible position on the premises as the sanitary authority might prescribe by written notice served upon the occupier, a movable receptacle in which the house refuse should be placed for the purposes of removal. A sanitary authority, desiring to start a system of daily removal of house refuse, and assuming to act under the by-law, gave notice by means of a printed notice to all the occupiers of houses within a specified area, requiring them to deposit on the kerbstone or edge of the footpath immediately in front of their respective houses a movable receptacle in which should be placed for the purposes of removal the house refuse which had accumulated since the preceding collection; the notice contained a statement that the dustmen were prohibited from going on the premises for dust in the streets within the prescribed area.

An occupier of a detached house standing back forty feet from the highway, and approached by a carriage drive, who had a conveniently accessible position on his premises in which he was willing to put his house refuse in a movable receptacle for purposes of removal, refused to comply with the notice by placing his house refuse in a receptacle on the kerbstone, and the sanitary authority refused to remove his house refuse from his premises, notwithstanding the service upon them by him of a written notice, under s. 30 of the Public Health (London) Act, 1891, requiring them to do so. A summons was taken out under s. 30, sub-s. 2, of that Act by the occupier against the sanitary authority for unlawfully and without reasonable cause failing to comply with the notice to remove the house refuse from his premises, and the sanitary authority were convicted of the offence charged:—

Held, that the notice was not a proper prescription of a conveniently accessible position as contemplated by the by-law, as it went beyond the by-law in prescribing that every occupier within a given area must place his house refuse in a receptacle on the kerbstone; that the sanitary authority had therefore failed without reasonable cause to discharge their statutory duty of securing the removal of the house refuse from the premises of the occupier, he being willing to place it in

an accessible position from which they could conveniently remove it, and that the conviction was right.

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CASE stated by a metropolitan police magistrate.

An information had been preferred by the respondent against the appellants under s. 30 of the Public Health (London) Act, 1891, charging them with having on January 19, 1905, without reasonable cause unlawfully failed to comply with a written notice dated January 16, 1905, requiring them to remove house refuse from the respondent's premises.

By a by-law made by the London County Council in pursuance of the Public Health (London) Act, 1891, it is provided that, "Where a sanitary authority arrange for the daily removal of house refuse in their district or any part thereof the occupier of any premises in such district or part thereof in which any house refuse may from time to time accumulate shall at such hour of the day as the sanitary authority shall fix and notify by public announcement in their district deposit on the kerbstone or on the outer edge of the footpath immediately in front of the house or in a conveniently accessible position on the premises as the sanitary authority may prescribe by written notice served upon the occupier a movable receptacle in which shall be placed for the purposes of removal by or on behalf of the sanitary authority the house refuse which has accumulated on such premises since the preceding collection by such authority. The sanitary authority shall collect such refuse or cause the same to be collected between the hours of the day as they have fixed and notified by public announcement in the district."

By a printed notice, dated October 12, 1904, the appellants gave notice to the respondent and to all other occupiers of houses within a certain defined area of the borough of Wandsworth, that on and after January 1, 1905, a system of daily removal of house refuse would be substituted for the weekly removal then prevailing; the notice then proceeded as follows: "Notice is also given, that in accordance with the by-law made by the London County Council with regard to the daily removal of house refuse, the occupier of any premises in the district from which house refuse is removed daily is required to deposit on the kerbstone or edge of the footpath immediately in front of the

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house a movable receptacle, in which shall be placed for the purposes of removal the house refuse which has accumulated on such premises since the preceding collection. The maximum penalty for non-compliance with the by-law is 5*l*. . . . ." The notice concluded thus: "The dustmen are prohibited from going on the premises for dust in the streets in the prescribed area." The notice was also published in a newspaper circulating in the borough. A circular explanatory of the notice was issued to the respondent and the other occupiers in the prescribed area. On January 2, 1905, the system of daily removal of house refuse was put into operation within the prescribed area in accordance with the notice; the collection began at 7.30 A.M. and was finished by 9.30 A.M.

The respondent was the occupier of a detached house, No. 37, Carlton Road, which was situate at a distance of forty feet or thereabouts from the highway and was approached from it by means of a carriage drive. He refused to comply with the requirements of the appellants contained in their notices, and no house refuse was removed by the appellants from his premises after January 9 until January 20. On January 16 the respondent gave written notice to the appellants requiring them to remove the house refuse from his premises, and the appellants in reply informed him that they would remove it, if it were placed on the kerbstone or edge of the footpath in accordance with their notice. The respondent was always ready and willing to place his house refuse in a proper receptacle in a conveniently accessible position on his premises for removal by the appellants, but under protest placed the house refuse from his premises in movable receptacles upon the kerbstone or edge of the public footpath in front of his premises on January 20 and subsequently to that date, and the house refuse so placed was removed by the appellants. On January 19 the respondent preferred the present information against the appellants.

The case further found that by the system of daily removal the time occupied in the removal of house refuse was much less than under the former system, and that in Carlton Road only half an hour was so occupied as against some hours formerly; but it was not proved what time it would take to remove the

house refuse in that road if all the occupiers placed their dustbins in reasonably accessible positions, as the respondent had offered to do. The by-law had been for some years in operation in other parts of the metropolis, where house refuse was placed in receptacles on the kerbstone or edge of the footpath, but there was no evidence as to the circumstances under which the by-law was put into operation in those districts. Out of a total of 3428 houses in the prescribed area there were 708 houses (including the respondent's house) which stood in their own grounds and had gardens or forecourts between them and the highway; there were 2253 which had no gardens or forecourts between them and the highway, and which were so constructed that the house refuse had to be carried through the building for the purpose of removal; and there were 467 houses having approaches on back streets or passages.

There had been considerable deliberation by the appellants before deciding to put the by-law into operation and before any report was made to them by their surveyor. The surveyor was not asked for, and did not present, any report giving details of the number of houses in which there were convenient and accessible positions for placing receptacles for the purpose of the daily removal system; his report was confined entirely to defining the area proposed for the operation of the daily removal system, and the appellants selected a representative area containing both poor class and better class houses. In one case compliance with the requirements of the appellants' notices involved the carriage of house refuse through the house, the refuse having previously been removed from the back garden or yard without being carried through the house.

The placing of receptacles containing house refuse upon the kerbstone or edge of the footpath immediately in front of the houses in the streets in the prescribed area in compliance with the appellants' notices caused a physical obstruction to the highway upon which they were placed.

There were some houses in Carlton Road which were provided with immovable dustbins or receptacles, and upon the owners' objection no notice (other than as aforesaid) had been served to provide the houses with movable receptacles such as were

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required by the appellants' notices or by the 18th by-law of the by-laws made by the London County Council under s. 39, sub-s. 1, of the Public Health (London) Act, 1891, which by-law is as follows: "Where the sanitary authority have arranged for the daily removal of house refuse in their district or in any part thereof the owner of any premises in such district or any part thereof shall provide an ashpit which shall consist of one or more movable receptacles sufficient to contain the house refuse which may accumulate during any period not exceeding three days which the sanitary authority may determine and of which the sanitary authority shall give notice by public announcement in their district. Each of such receptacles shall be constructed of metal and provided with one or more suitable handles and cover. The capacity of each such receptacle shall not exceed two cubic feet. Provided always that this by-law shall not apply to the owner of any premises until the expiration of three months after the sanitary authority have publicly notified their intention to adopt a system of daily collection of house refuse in that part of their district which comprises such premises."

The respondent contended: (*a*) That the by-law and notice respectively were ultra vires as being repugnant to the law—(1.) as involving acts of wilful obstruction and the creation of nuisances, (2.) as being contrary to ss. 30 and 34 of the Public Health (London) Act, 1891, (3.) as being inconsistent with by-law 18 of the London County Council, made under s. 39, sub-s. 1, of that Act; (*b*) that the notice was bad in point of law by reason of its limiting the operation of the by-law as to the time and locality; (*c*) that the by-law was unreasonable by reason of being partial and unequal in its operation; (*d*) that, assuming the by-law to be legally valid, the appellants were wrong in applying generally the one alternative, and that occupiers of premises upon which conveniently accessible positions could be found for the placing of receptacles containing house refuse should not be compelled to place their house refuse outside the premises; (*e*) that on these grounds the appellants had no reasonable cause for failing to comply with the respondent's written notice.

The appellants contended: (*a*) That they had properly and legally fulfilled their duty under s. 30 in regard to the

respondent's house refuse on January 19, 1905, and at all times; (*b*) that the by-law and notice respectively were valid in law and neither ultra vires nor unreasonable; (*c*) that in operation the new system created no obstruction or nuisance, and that in the case of the majority of the occupiers in the prescribed area it was of great convenience and benefit; (*d*) that the non-compliance of the respondent with the appellants' notice was reasonable cause within s. 30, sub-s. 2, entitling the appellants to a dismissal of the information; (*e*) that, assuming the by-law to be ultra vires or unreasonable, the appellants were entitled to rely upon a by-law duly made by the London County Council so long as it was in existence and was not held to be invalid, and that such reliance was reasonable cause entitling them to have the information dismissed.

The learned magistrate was of opinion that the appellants had failed without reasonable cause to perform the duties cast upon them under s. 30 of the Public Health (London) Act, 1891 (1), in that they had failed to remove the house refuse from the respondent's premises; that the notice of October 12, 1904, went beyond the by-law to such an extent as to give the occupier permission to cause an obstruction in the street; that the notice amounted to an order to the respondent to place his dustbin on the pavement in front of his premises, and that the respondent was justified in refusing to obey such order, inasmuch as it amounted to an order to do something which entailed the commission of illegal acts. He was further of opinion that it was not necessary to decide (and he did not decide) whether the by-law was a valid by-law, because it had been put into operation by the appellants in an illegal and unreasonable manner, whereas it might have been put into operation in a legal and reasonable

(1) By 54 & 55 Vict. c. 76 (the Public Health (London) Act, 1891), s. 30, sub-s. 1, "It shall be the duty of every sanitary authority—(*a*) to secure the due removal at proper periods of house refuse from premises . . . . ; and (*b*) where the house refuse is not removed from any premises in the district at the ordinary period, ... and the occupier of the premises serves on the authority a written notice requiring the removal of such refuse, ... to comply with such notice within forty-eight hours after that service . . . . " By s. 30, sub-s. 2, "If a sanitary authority fail without reasonable cause to comply with this section, they shall be liable to a fine not exceeding twenty pounds."

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manner, since he found as a fact that the respondent had a reasonably accessible position on his premises from which the sanitary authority might have removed his house refuse. He was further of opinion that the by-law contemplated voluntary arrangements being made between occupiers and the sanitary authority as to house refuse, which there had been no attempt to make in the present case.

The question for the opinion of the Court was whether upon the statement of facts in the case the magistrate came to a correct determination in point of law.

Avory, K.C. (*Bernard Campion* with him), for the appellants. The magistrate has not found that the by-law was invalid, but that it was put in force by the appellants in an unreasonable manner. The by-law, being valid, affords a reasonable excuse to the appellants for not complying with the respondent's notice to remove his house refuse. The mode in which the by-law should be applied to the prescribed area was a matter for the exercise of the discretion of the sanitary authority, and the Court will not interfere with a bona fide exercise of their discretion. They have exercised their discretion by deciding within what area within their jurisdiction the occupiers are to place their house refuse upon the kerbstone. The magistrate has in effect substituted his own discretion for that of the sanitary authority.

[LORD ALVERSTONE C.J. I have great doubt whether, looking at the duty to remove house refuse which is imposed on the sanitary authority by s. 30, the prohibition in the last paragraph of the notice against the dustmen going on the premises for dust could possibly be justified.]

It is true that the section makes it the duty to "secure" the removal of house refuse at proper periods, but that contemplates that the occupier shall do what is required to facilitate the removal.

As to the question of reasonable cause, any failure to comply arose from the fact that the appellants were acting under a perfectly valid by-law of the County Council, and such a failure is not a failure to comply without reasonable cause.

Macmorran, K.C., and *R. Cunningham Glen*, for the respondent, were not called upon to argue.

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LORD ALVERSTONE C.J. The question raised by the present case is one of some importance. I am of opinion that the decision of the magistrate was right and must be affirmed; I do not indeed agree with some of his reasons, though I make this remark with some hesitation, as we have not called upon the respondent's counsel to support the decision.

The summons charged the appellants with not removing house refuse from the respondent's premises after notice to remove it, pursuant to s. 30 of the Public Health (London) Act, 1891, the ground of the complaint being that they had failed to remove it without reasonable excuse. It must be taken as a fact, and it is indeed found in the case, that the respondent had on his premises a position conveniently accessible to the workmen of the appellants from which the sanitary authority could have removed the refuse, and that the respondent was willing to place the refuse in that position. Therefore the decision with which we have to deal in this appeal is limited to the case where a person has put, and is willing to continue in the future to put, his house refuse in a convenient position for removal on his premises, and the local authority refuses to go on his premises to remove it, contending that they have a right in their discretion so to refuse and to require the occupier to bring out his house refuse from off his own premises and place it on the kerbstone. I must here point out that the appellants, who were the sanitary authority, went considerably beyond the provisions contained in the by-law of the County Council, even when the construction is placed upon it which has been contended for on their behalf. [His Lordship read the by-law.] I agree with the suggestion of the appellants' counsel that a question may arise whether, if notice is given by the sanitary authority under the by-law and under the Act of 1891 to the occupier of a particular house that his house refuse must be placed on a particular spot for removal, the magistrate can override the exercise of discretion by the sanitary authority as expressed in their notice; but that state of facts is not raised by the present case. Here the appellants have given a notice that everybody within a given area shall place the receptacle containing his house refuse on the kerbstone; in other words, they have not prescribed by a written notice served on the

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occupier a conveniently accessible position on the premises on which the receptacle containing the house refuse shall be placed, but have given notice, without regard to the circumstances affecting particular premises, that in a certain district everybody's house refuse is to be placed on the kerbstone. It has been contended before us that it is the only method by which a system of daily removal of house refuse can be carried out, but I am unable to accede to that contention. Even if we assume that a sanitary authority might prescribe with regard to particular premises and that a magistrate could not go behind that prescription, as to which I express no opinion, that is not the case which we have to consider. The notice of the appellants was general in its terms, and applied to every house within a specified area, and it ordered every occupier to place his house refuse on the kerbstone, and such a notice in my opinion went beyond the by-law. I sympathize very strongly with the wish of the sanitary authority to have a daily removal of the house refuse from houses within their jurisdiction, and should be most unwilling to embarrass them in their well-meant efforts; but we must not omit to consider what are their duties and what are the occupier's rights. The obligation to remove house refuse clearly rests on the sanitary authority; the owners and occupiers can be called upon to facilitate their efforts; and I agree that a person may be called upon to incur a certain amount of expense in facilitating the removal, as, for example, by providing movable dustbins for that purpose. But the serious question is whether a local authority, in applying a by-law, can frame their notice in such a way as to apply only part of the by-law and thereby relieve themselves of their obligation of removing house refuse in cases where the occupier is willing to do everything which, apart from the requirements of the general notice, he can be called upon to do. In the present case it is found that the respondent was willing to place his house refuse in a proper movable receptacle and to put it in a conveniently accessible position on his premises. The appellants refused to remove it, unless the receptacle were brought to and deposited on the kerbstone, whatever might be the distance which it would have to be brought, because the

respondent lived in a particular area in respect of which the appellants had made this general rule. In my opinion the notice given by the appellants was not a proper prescription of a place in reference to the respondent's premises such as is contemplated by the by-law; the prescription there contemplated must have reference to the particular premises, and if there is no prescription as to the particular premises the obligation upon the occupier would be to put his house refuse in a conveniently accessible position on his premises for removal. Without saying that the notice is in itself invalid, though a modification of its terms would probably be advisable, I think that such an attempt to enforce it as has here been made, by compelling everybody within the area affected to place his house refuse on the kerbstone although he was able and willing to place it in a conveniently accessible position on his premises, is quite unreasonable. I am therefore of opinion that the magistrate was right in holding that the appellants had been guilty of a failure of their duty to remove the respondent's house refuse, he being willing to put it in an accessible position on his premises from which it might be conveniently removed. I do not feel pressed by the objection that the placing of the receptacles on the kerbstone created an obstruction of the highway, but, as we have not called upon the respondent's counsel, I express no decided opinion on the point.

There remains the question whether the refusal of the appellants to remove the respondent's house refuse was a refusal without reasonable cause within the meaning of the section, because no doubt the respondent could have ensured the removal of the refuse if he had had it taken down to the kerbstone. It seems to me that this raises in another form the same point with which we have already dealt. If the sweeping regulation that all house refuse within the prescribed area was to be brought to, and deposited on, the kerbstone was one which the local authority, having regard to the terms of the by-law, were not entitled to make or enforce, then their refusal to remove the house refuse from a conveniently accessible position offered to them by the respondent was a refusal to remove without reasonable excuse within the meaning of s. 30, sub-s. 2. For these

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reasons I am of opinion that the magistrate's decision was substantially right, and must be affirmed.

RIDLEY and DARLING JJ. concurred.

Appeal dismissed.

Solicitors for appellants: *W. W. Young & Co.*
Solicitors for respondent: *Turner & Co.*

W. J. B.

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Feb. 12.

LAVELL *v.* RICHINGS.

Landlord and Tenant—Distress—Implement of Trade—Cab over the value of 5l.—Law of Distress Amendment Act, 1888 (51 & 52 *Vict.* c. 21), *s.* 4—*County Courts Act*, 1888 (51 & 52 *Vict.* c. 43), *s.* 147.

A distress having been levied on a stable, which was in the occupation of a cab-driver, for rent in arrear, the only article on the premises proved to be a cab of the value of more than 5*l.*, which was accordingly seized:—

Held, that the cab was privileged from seizure under s. 147 of the County Courts Act, 1888, as an implement of the man's trade, and that the fact that it was above the value of 5*l.* did not exclude the operation of the exemption.

APPEAL from the Southwark County Court.

The plaintiffs were job-masters, and in the ordinary course of business they let a cab to one Dingley, a cab-driver, at a weekly rent of 12*s.* Dingley kept the cab in a stable at Fulham, which he rented. The rent having become in arrear, the landlord of the premises in March, 1905, caused a distress to be levied. There was at that time on the premises nothing but the cab, which was accordingly seized, and ultimately by the landlord's instructions was put up for sale and bought by the defendant for fifteen guineas. The defendant sent the cab to another auctioneer for sale, and while at his repository it was claimed by the plaintiffs. The auctioneer interpleaded, and this issue was directed to ascertain the ownership of the cab, which was valued by the plaintiffs at 35*l.*, the question being whether the cab was an implement of trade which could be seized for

rent. The county court judge gave judgment for the plaintiffs, and the defendant appealed.

Francke, for the defendant. By s. 4 of the Law of Distress Amendment Act, 1888, goods and chattels of the tenant or his family are protected from distress "which would be protected from seizure in execution under s. 96 of the County Courts Act, 1846, or any enactment amending or substituted for the same." The section now in force is s. 147 of the County Courts Act, 1888, which provides that any of the goods and chattels of a person may be seized "excepting the wearing apparel and bedding of such person or his family, and the tools and implements of his trade, to the value of 5*l.*, which shall to that extent be protected from such seizure." In *Masters* v. *Fraser* (1) Darling J. pointed out that the object of the Legislature was that a man should not be thrown upon the community by being deprived of the means of earning his own livelihood. That would not be the case here. This man was not bound to drive this particular cab, but could drive any other and could go to any cab proprietor and get a cab on the ordinary terms. The cab, therefore, was not an implement of his trade. If, however, the Court should be of a contrary opinion, the cab was over the value of 5*l.*, and was therefore not protected under the section.

Radcliffe, K.C. (*Schwabe* with him), for the plaintiffs. "Implements of trade" in the section mean existing implements of an existing trade, and it is no answer to say that a man might go elsewhere and make use of other implements. The section provides that implements of trade up to the value of 5*l.* shall be protected, and if, as here, the only implement is of greater value than 5*l.* and cannot be severed, it cannot be seized.

LORD ALVERSTONE C.J. This case raises an interesting and novel point. The first question that we have to decide is whether the county court judge was right in taking the view that the cab which was at the time in the possession of, and was being used by, the person who was owing rent for this stable comes within the words of exception in s. 147 of the County Courts Act, 1888,

(1) (1901) 85 L. T. 611.

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as being an implement of his trade. It is admitted that the cab was worth something between 25*l.* and 35*l.*, and also that it was the only thing on the premises which could be seized. It is contended that it was not an implement of the cabman's trade because he having skill and knowledge in driving was not necessarily bound to use this particular cab, but could go elsewhere and continue to carry out his business or trade as a cab-driver by hiring a cab from a cab-proprietor. I do not think that that is a good argument. The case of *Fenton* v. *Logan* (1) in my opinion supports the view we are taking. I think this cab which the man had hired by the week and was using was properly regarded by the county court judge as being an implement of his trade.

A more difficult question, however, arises as to the limitation of value. The section excepts "implements of his trade, to the value of 5*l.*, which shall to that extent be protected from such seizure." In my opinion that means that the landlord must leave a man at least 5*l.* worth of tools, and if there is no tool on the premises which is of less value than 5*l.* the protection given by the statute is not taken away merely because the landlord has to leave something which is worth more than 5*l.* The point was indirectly raised in *Churchward* v. *Johnson* (2), where it was held that a sewing machine which was of the value of 8*l.* 10*s.* was an implement of trade and was privileged from distress. I think the circumstances of the case are exceptional and peculiar and are not very likely to occur again, but I am of opinion that the county court judge was right, and that this appeal must be dismissed.

RIDLEY J. I agree.

DARLING J. I am of the same opinion. I agree with my Lord that this cab is an implement of the man's trade.

As to the point of limitation, I do not think that it was intended that if the only implement on the premises was of greater value than 5*l.* it should be excluded from the protection given by the statute. I think that the original reason for this

(1) (1833) 9 Bing. 676. (2) (1889) 54 J. P. 326.

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sort of exemption was to prevent a man from being placed in such a position that he could not earn his own livelihood and so would become a charge on society; but I did not mean in what I said in *Masters* v. *Fraser* (1) that I thought the exemption only applied to persons who were dependent on their trade as a means of support. My decision in that case was based on the opinion of Willes C.J. in *Simpson* v. *Hartopp*. (2)

Appeal dismissed.

Solicitor for defendant: *C. Aplin Nichols.*

Solicitor for plaintiffs: *H. E. Tudor.*

A. P. P. K.

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Feb. 21.

County Court—Practice—Right of Plaintiff to Reply.

Where the defendant in an action in a county court calls evidence, the plaintiff has a right to reply.

APPEAL from the decision of the Oxford County Court.

At a trial before the judge of the county court and a jury, evidence having been called for the defendant, the plaintiff's counsel proposed to address the jury in reply. Objection was taken on behalf of the defendant, and the judge upheld the objection. A verdict for the defendant was returned, and the plaintiff then applied for a new trial, on the grounds that the verdict was against the weight of the evidence and that the judge was wrong in refusing to allow the plaintiff's counsel to address the jury in reply. The county court judge gave no decision on the first ground, but refused the new trial on the ground that he had a discretion to refuse to allow the plaintiff's counsel to reply. From this decision the plaintiff appealed.

Ames, for the appellant. The county court judge had no right to refuse to allow the plaintiff's counsel to reply. The right of the plaintiff to reply is the same in the county court as it is in the High Court. By s. 18 of the Common Law Procedure Act, 1854 (17 & 18 Vict. c. 125), "the right to reply shall be the same as at present," and that is substantially re-enacted by

(1) 85 L. T. 611. (2) (1744) Willes, 512.

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Order XXXVI., r. 36. By s. 164 of the County Courts Act, 1888, the general principles of practice in the High Court of Justice may be adopted. The right to reply has been recognized from early days: *Crerar* v. *Sodo* (1); Tidd's Practice, 9th ed. p. 858; and where the defendant put in evidence the plaintiff had an undoubted right to reply. There is nothing in the County Courts Act to take away this right. In *Dymock* v. *Watkins* (2) the right of the defendant to make a second speech was held to be a matter within the discretion of the county court judge, but the case is different in regard to the plaintiff's right to reply.

Turrell, for the respondent. There is no statutory right to reply in the county court, and the matter is therefore one for the discretion of the judge. As in *Dymock* v. *Watkins* (2), this Court will not interfere with the discretion of the judge to regulate the practice in his court. Even, however, if the judge had no such discretion, this Court will not interfere unless some substantial wrong has been occasioned: *Booth* v. *Millns.* (3)

Ames replied.

C. A. Russell, K.C., as amicus curiæ, referred the Court to s. 72 of the County Courts Act, 1888.

LORD ALVERSTONE C.J. In my opinion this case requires further consideration by the county court judge. He has not dealt with the matter satisfactorily, but I doubt whether we can order a new trial. The county court judge has admittedly not considered the questions whether the verdict was against the weight of the evidence and whether he ought to grant a new trial on that ground.

It will be convenient first to state the law on the subject. I am obliged to Mr. Russell for calling our attention to s. 72 of the County Courts Act, 1888, which gives counsel the right to appear in the county court, and recognizes his right to address the court on behalf of his client. There is no statute that gives the right of reply either in the county court or in the Superior Court. Sect. 18 of the Common Law Procedure Act is now practically re-enacted by r. 36 of Order XXXVI., and that provides that "the right of reply shall be the same as heretofore."

(1) (1827) M. & M. 85. (2) (1883) 10 Q. B. D. 451.
(3) (1846) 15 M. & W. 669.

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In the Superior Courts the right of reply depends on a long-established custom that where the defendant has called evidence the plaintiff has the right to reply. There are many cases in which the question has been discussed whether the defendant had done enough in the way of calling evidence to give the plaintiff the right to reply, and whether what the defendant had done amounted to calling evidence at all. Therefore we may take it that the right of the plaintiff to reply where the defendant had called evidence has been recognized by long custom in the Superior Courts. The practice of the Superior Courts has been largely followed in the county courts. Sect. 164 of the County Courts Act, 1888, says: "In any case not expressly by this Act or in pursuance thereof provided for the general principles of practice in the High Court of Justice may be adopted and applied to actions and matters." No doubt there must be some discretion in the county court judge, as in the High Court judge, to see that there is no abuse of the procedure of his court, and it may well be that, owing to the number of cases that come before him and the necessity for celerity in dealing with them, the county court judge has a larger discretion to regulate the practice of his court and to repress unnecessary speeches; but his discretion must be exercised in accordance with the well-settled and leading principles of practice at common law. It is obvious from the cases that have been cited that it has long been held that the plaintiff's right to reply depends on the question whether or not the defendant had called evidence.

My brother Darling has called my attention to Best's treatise on the Right to Begin and Right to Reply, published in 1837. In chap. 3, at p. 85, that very learned author says: "It is universally admitted and is every day's practice, that when the defendant or party who is to speak second calls witnesses or puts in any evidence to the issue, that [*sic*] the counsel who began has, what is called, a right of general reply"; and he cites authorities, beginning with Lord Mansfield C.J. in *Rex* v. *Horne* (1), in 1777, and going down to 1832.

That is a very authoritative statement of the rule by a very

(1) (1777) 20 How. St. Tr. at p. 662.

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learned man, and there seems to me no reason why it should not be followed as strictly in the county court as in the Superior Court. I think that in both Courts where the defendant has called evidence the plaintiff has the right to reply.

Now, ought we here to order a new trial? As I understand it, the judge has not considered the question whether the verdict was against the weight of the evidence. He has merely refused the new trial on the ground that he was right in refusing to allow the plaintiff's counsel to reply. I think the analogy of the cases on the right to begin and the onus of proof is a guide as to what we ought to do, not merely because the right to begin generally carries with it the right to reply, but because of the principle which has been laid down in those cases. In *Branford* v. *Freeman* (1) the Court held that a new trial ought not to be granted because a judge had ruled wrongly as to which party must begin "unless such ruling did clear and manifest injustice"; and Parke B. explains the judgment of Lord Abinger in *Huckman* v. *Fernie* (2) as being to the same effect. The mistake in that case in the report of Lord Abinger's judgment was also corrected by Alderson B. in *Booth* v. *Millns.* (3) I think, therefore, that we ought not now to order a new trial, but that we must send the matter back to the county court judge, and if he thinks that his refusal to allow the plaintiff's counsel to reply has done a clear and manifest wrong, it will be his duty to order a new trial, as he must regard our ruling that there was under the circumstances a right to reply which he had no discretion to refuse. He will also, of course, consider the question whether the verdict was against the weight of the evidence.

RIDLEY and DARLING JJ. concurred.

Case remitted to county court judge.

Solicitors for appellant: *Edridge & Newnham.*
Solicitor for respondent: *Hatt, Oxford.*

(1) (1850) 20 L. J. (Ex.) 36. (2) (1838) 3 M. & W. 505.
(3) 15 M. & W. 669, at p. 671.

A. P. P. K.

[IN THE COURT OF APPEAL.]

C. A.
1906
Feb. 27.

LAW *v.* LLEWELLYN.

Defamation—Slander—Magistrate—"Judge"—Criminal Charge—Withdrawal of Prosecution—Defamatory Words against Prosecutor—Malice—Privilege—Reasonable Cause of Action—Striking out Pleading—Rules of Supreme Court, 1883, *Order* XXV., *r.* 4.

A magistrate, when sitting in the course of his judicial duties, is a "judge" within the meaning of the rule laid down by *Munster* v. *Lamb*, (1883) 11 Q. B. D. 588, and *Hodson* v. *Pare*, [1899] 1 Q. B. 455—that defamatory observations by a judge in the course of his judicial duties are not actionable. Thus a defamatory statement made by a magistrate, while sitting in the course of his judicial duties, respecting a prosecutor upon or with reference to the withdrawal of a criminal charge before the Court, was held not to be actionable, even though it was alleged that the statement was made falsely and maliciously and without reasonable cause. Accordingly, the statement of claim in an action for slander brought by the prosecutor against the magistrate on the ground of that defamatory statement was ordered to be struck out under the Rules of the Supreme Court, Order XXV., r. 4, as disclosing no reasonable cause of action.

Decision of Channell J. affirmed.

Allardice v. *Robertson*, (1830) 1 Dow & Cl. 495, is not law in England.

APPEAL from an order made by Channell J. in chambers, under the Rules of the Supreme Court, 1883, Order XXV., r. 4, directing the statement of claim in the action to be struck out "as disclosing no reasonable cause of action."

The statement of claim contained allegations to the following effect. The plaintiff, Edmund Law, was a member of the Neath Town Council and of various other public bodies, and was also one of the managers of the educational committee for the county of Glamorgan (Neath group). The defendant was a justice of the peace for the county of Glamorgan, and was, at the time of the speaking and publishing of the words hereinafter set out, sitting as chairman of the justices at a Court of summary jurisdiction at Bridgend, in the said county. On July 1, 1905, at a public sitting of the said Court, the plaintiff appeared by counsel for the purpose of prosecuting a charge against William Thomas

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and Rees Thomas for obtaining money by false pretences. The plaintiff was, however, advised by his counsel that, in the absence of certain witnesses, it would be impossible to secure a conviction against the accused; and, acting upon his counsel's advice, the plaintiff agreed to withdraw the said charge and pay the costs of the solicitor of the accused upon their undertaking to bring no action against him in respect of the said proceedings or otherwise. "The said agreement was duly signed by the legal representatives of the said parties, and the said Court was then informed by counsel that the plaintiff had withdrawn the said charge upon the said conditions. The defendant then falsely and maliciously, and without any reasonable cause whatsoever, spoke and published of the plaintiff the words following, that is to say: 'It is our opinion' (meaning the opinion of the defendant and his fellow-magistrates) 'that this' (meaning the said criminal charge) 'has been a gross attempt to blackmail, and it would have been well if the matter had come before the Public Prosecutor. From what we have heard of this man, Edmund Law, he has been in the habit of trying to extort money from persons by illegal means, and if he found himself in gaol for twelve months it would possibly do him a good deal of good.'"

The statement of claim did not actually state that formal leave was given to withdraw the charge; but it appeared from evidence that had been filed in the case that the defendant, the chairman, before making the above observations, said that the magistrates would allow the case to be withdrawn, and that he repeated this after having made those observations.

The statement of claim then went on to allege that the defendant meant, and intended to mean, that the plaintiff was a blackmailer, and that he, the plaintiff, had brought an unfounded charge against the Thomases, and had been guilty of having committed some criminal offence; and that by reason of the said defamatory matter he, the plaintiff, had been greatly injured in his character and reputation, and had suffered damage. He accordingly claimed damages for the alleged slander by the defendant.

On January 29, 1906, Channell J., on an application in chambers by the defendant, ordered the statement of claim to

be struck out "as disclosing no reasonable cause of action," but gave the plaintiff leave to appeal.

The plaintiff accordingly appealed.

The appeal was heard on February 27, 1906.

S. T. Evans, K.C., *Montague Lush*, K.C., *Lewis Thomas*, and *Harold S. Stowe*, for the plaintiff. We do not dispute the general rule that defamatory words spoken by a person acting in a judicial capacity in the course of any proceeding before him are privileged, and therefore not actionable, even though spoken maliciously. But that is not this case. Here there was no inquiry proceeding when the defendant spoke the words complained of, for the charge was withdrawn, and there was, in fact, no proceeding before the Court when the words were spoken. Therefore the defendant cannot claim privilege.

[ROMER L.J. It seems to me lamentable that a magistrate, if he sees at once that a charge brought before him is one that ought never to have been made, is not at liberty to say so.]

But here he knew nothing, and could know nothing, of the facts, for the case was never opened. Moreover, it has been held by the House of Lords that the privilege enjoyed by a judge of the Superior Courts does not extend to a judge of an inferior Court, and accordingly that a magistrate is responsible for defamatory words maliciously uttered: *Allardice* v. *Robertson*. (1)

[*Eldon Bankes*, K.C., for the defendant. That was a Scottish case. It has never been followed since, either in Scotland or in England.]

The case was referred to without disapproval by Cockburn C.J. in *Seaman* v. *Netherclift*. (2) He never suggested that it did not apply in England. There is no authority that a magistrate sitting as a judge of an inferior Court is under any immunity from responsibility for words slanderously uttered, as in the case of a judge of a Superior Court. No doubt, in order to make a magistrate liable, it must be shewn that he uttered the words complained of maliciously: *Taylor* v. *Nesfield*. (3) And in the present case the defendant must have

(1) 1 Dow & Cl. 495. (2) (1876) 2 C. P. D. 53, 58.
(3) (1854) 3 E. & B. 724, 730.

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been speaking maliciously, for there was no occasion for his making these slanderous remarks, there being no case before him for decision. Privilege can be claimed by a judge only while sitting in his judicial capacity, that is, while actually trying the cause: *Scott* v. *Stansfield*. (1) So also the privilege of counsel only applies where the defamatory words are spoken in the course of a judicial inquiry and are relevant and pertinent to the matter in issue: *Hodgson* v. *Scarlett* (2); *Munster* v. *Lamb*. (3)

[ROMER L.J. In that last case (4) Brett M.R. says, referring to *Scott* v. *Stansfield* (5), it was there held that "all judges, inferior as well as superior, are privileged for words spoken in the course of a judicial proceeding, although they were uttered falsely and maliciously, and without reasonable or probable cause."]

That does not apply to a magistrate: he is never spoken of as a "judge." But *Munster* v. *Lamb* (6) does not really touch this case. There the words were uttered during the inquiry, whereas here they were uttered when there was no inquiry proceeding, and the facts were in no way before the Court; the case was, in fact, over and done with.

So in *Hodson* v. *Pare* (7) it was held that statements made by a justice of the peace when acting as a judicial authority under a statute are privileged provided they are made "in the course of the proceedings."

In short, all the cases shew that privilege is subject to two limitations: first, that the statement must be relevant and pertinent to some question before the Court; and, secondly, that it must have been made in the course of the inquiry. Under such circumstances it cannot be correct to say that this is a frivolous action and brought without reasonable cause.

Eldon Bankes, K.C., and *Hugh Fraser*, for the defendant, were not called upon.

ROMER L.J. In my opinion this appeal fails.

In opening the appeal Mr. S. T. Evans said, and in my opinion

(1) (1868) L. R. 3 Exch. 220, 222-3.
(2) (1818) 1 B. & Ald. 232, 241, 243.
(3) (1883) 11 Q. B. D. 588, 600.
(4) Ibid. at p. 603.
(5) L. R. 3 Exch. 220.
(6) 11 Q. B. D. 588.
(7) [1899] 1 Q. B. 455.

said rightly, that it was hopeless to contend at the present day that a justice of the peace sitting in petty sessions to dispose of a criminal case which comes before him is not acting judicially. Consequently a defamatory statement made by him in the course of the proceedings before him cannot be actionable as against that justice. That has been, to my mind, clearly settled beyond controversy by the two cases which have been referred to—*Munster* v. *Lamb* (1) and *Hodson* v. *Pare*. (2) Both cases are to the same effect, and shew that a magistrate is a "judge" within the meaning of the rule that defamatory observations made by a judge in the course of his judicial duties, that is, when sitting as a judge, are not actionable, even though it is alleged or suggested that the observations were made without reasonable or probable cause, and maliciously.

But Mr. Montague Lush boldly attempted to re-argue that question, and he did so by reference to the decision in a Scottish case of *Allardice* v. *Robertson*. (3) With reference to that case, all I need say is this, that whether it correctly lays down the law in Scotland at the present time or not—as to which I cannot say—certainly it is a case dealing with Scottish law only, and is not binding upon this Court: it cannot, therefore, be regarded as an authority for the proposition for which Mr. Lush cited it. It is not an authority against the law as I have stated it, and as illustrated by the cases to which I at first referred.

It is said that *Allardice* v. *Robertson* (3) was referred to without disapproval by Cockburn C.J. in *Seaman* v. *Netherclift*. (4) All I need say with regard to that is this, that if reference is made to the observations of the Lord Chief Justice in the latter case it will be noticed that he was not referring to *Allardice* v. *Robertson* (3) for the purpose of approving it, or anything of the sort. It was a case that had been cited to him, and all he said with reference to the case was this, that it was not an authority covering the question which he had there to decide. And that clearly was so. The reference to the case by the Lord Chief Justice in no wise constituted a recognition

(1) 11 Q. B. D. 588.
(2) [1899] 1 Q. B. 455.
(3) 1 Dow & Cl. 495.
(4) 2 C. P. D. 53, 58.

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Romer L.J.

by him that *Allardice* v. *Robertson* (1) was an authority binding on the English Courts for the point of law which it purports to decide.

That being so, so far as the law is concerned, it is clear that this action against the defendant, Mr. Llewellyn, will not lie, if it be that the observations which are said to have been made by him, and which are said to have been libellous and malicious, were uttered by him in the course of his duty as magistrate. To my mind, they clearly were uttered under such circumstances as made them privileged. The circumstances are stated in the statement of claim, and shortly they amount to this: The plaintiff, Edmund Law, had brought a criminal charge against two persons, and when that charge came before the defendant, sitting, as he was, as a justice of the peace in sessions, the plaintiff stated that he had withdrawn the charge, and agreed to pay the costs of the solicitor of the persons against whom the charge had been made upon their undertaking to bring no action against him, the plaintiff, in respect of the proceedings he had instituted. Being a criminal charge, it could not have been withdrawn as a matter of course. Under the circumstances it was clearly impossible for the magistrates to insist upon the charge not being withdrawn: that would have done no good, especially as the magistrates were of opinion that there was no real crime on the part of the persons against whom the charge had been made. Under those circumstances the chairman, Mr. Llewellyn, had to state why, in his opinion and in that of his brother magistrates, nothing could be done except to allow the charge to be withdrawn, and it was upon giving leave accordingly that he made the observations which are said to be libellous.

In my opinion, it was clearly within his jurisdiction at that time to make observations with regard to a pending summons: the observations he did make were, therefore, observations made in the course of his judicial duty, and consequently are not actionable. In those circumstances it seems to me this action is clearly frivolous and vexatious. As I have stated, the law is clear, and the allegations in the statement of claim are clear; and, that

(1) 1 Dow & Cl. 495.

being so, it appears to me that the learned judge below rightly discharged his duty in striking out the statement of claim as being frivolous and vexatious. I am of opinion that his decision was right, and the appeal must be dismissed.

COZENS-HARDY L.J. I agree.

S. T. Evans, K.C., for the plaintiff. The Court has dealt with this case upon the assumption, which must of course be taken from the statement of claim, that the words in question were spoken in the course of the proceedings. But suppose the magistrate had said, "We will allow this case to be withdrawn," and then went on and added those words. There, it is submitted, the words would not have been spoken in the course of the proceedings, and that, at any rate, that is a matter which ought to be determined, and leave should be given to amend the statement of claim.

COZENS-HARDY L.J. It makes no difference whether the magistrate said at first, "We will allow this case to be withdrawn," and then uttered the words complained of, or whether he said, "In my opinion the facts are so and so," and then allowed the case to be withdrawn.

ROMER L.J. It makes no difference whatever. The observations are made in the course of one transaction. We refuse leave to amend, and dismiss the appeal with costs.

Appeal dismissed.

Solicitors: *H. G. Rastall, for A. Jestyn Jeffreys, Neath: Bell, Brodrick & Gray, for T. J. Hughes & Lewis, Bridgend.*

G. I. F. C.

1906
Feb. 27.

CROCKER *v.* MAYOR AND CORPORATION OF PLYMOUTH.

Education Acts—Non-provided School—Teacher engaged by Managers—Salary paid directly by Local Education Authority—Right of Teacher to sue Local Education Authority—Education Act, 1902 (2 *Edw.* 7, *c.* 42), *s.* 7.

Sect. 7 of the Education Act, 1902, does not create privity of contract between a teacher in a non-provided school and the local education authority, notwithstanding the fact that the salary of the teacher is paid directly by the authority. The teacher, therefore, cannot maintain an action for salary against the local education authority.

Appeal from a decision of the judge of the Plymouth County Court.

The action was brought by a married woman, a schoolmistress of a non-provided school in Plymouth, to recover 32*l.* 8*s.* 4*d.* as arrears of salary from the defendants, the local education authority, under the Education Act, 1902, under the following circumstances:—

By an agreement in writing dated March 22, 1899, the plaintiff, then Miss Stone, a certificated teacher, was employed by the managers of the Compton National School, which was a public elementary school, as assistant mistress of that school, at a salary of 50*l.* a year, rising by yearly increments of 5*l.* to a maximum of 80*l.*, payable monthly, and subject to three calendar months' notice to terminate the agreement on either side.

On April 1, 1903, the Education Act, 1902, came into operation, and by virtue of that Act the defendants became the local education authority for Plymouth, and as such the duty of maintaining and keeping efficient all public elementary schools within their area and controlling all expenditure required for that purpose, was cast upon them.

The plaintiff continued to act as such assistant mistress down to the commencement of the action. No express contract had been entered into between the plaintiff and the defendants, and no written or verbal proposal for any such contract passed between them. The defendants continued from time to time to pay the plaintiff's salary to her directly in the amounts and at

the times stipulated in the agreement down to November 30, 1904, and the plaintiff gave receipts for the same to the defendants.

On August 4, 1903, the following resolution was passed by the defendants: "Resolved, that the marriage of principal and assistant mistresses in provided and non-provided schools shall be equivalent to three months' notice to terminate the engagement"; and that resolution was communicated to a manager of the school in which the plaintiff was a teacher, but neither this communication nor the resolution itself was directly brought to the plaintiff's notice, although she admitted that she heard of the regulation from various sources outside the school.

On August 9, 1904, the plaintiff married a Mr. Crocker, and on November 30, 1904, she received a letter from the defendants' education secretary in the following terms: "I beg to inform you that the three months' notice to which, under the regulations, your marriage was equivalent having now expired, the salary sent herewith will be your final payment as a teacher on the staff of the Compton mixed school." No notice to terminate the plaintiff's employment was given to the plaintiff either by the defendants or by the managers.

On December 12, 1904, a manager of the Compton school wrote to the defendants' education secretary a letter pointing out that the resolution of August 4, 1903, was not a direction to the managers, and asking if it was not the proper course to direct them to give the plaintiff notice to determine the agreement. No answer to this letter was put in evidence.

The plaintiff, contending that her dismissal could only come from the managers of the school, continued to serve as teacher, and as the defendants declined to pay her any salary after November 30, 1904, she sued them for the same for the period from December 1, 1904, to April 30, 1905.

The county court judge gave judgment in favour of the plaintiff for the amount claimed, being of opinion upon the evidence that, at any rate after the first payment by the defendants to the plaintiff of her salary, there had been a novation, the new contract being on the terms of the original contract, except in so far as they were altered by the Education Act, 1902, with a substitution of the defendants as debtors in lieu of the managers. He

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was further of opinion that, even assuming the resolution of August 4, 1903, to be a direction to the managers to dismiss the plaintiff, the defendants ought, when the managers failed to give the plaintiff notice of dismissal, to have given such notice themselves; he further expressed the view that it would be wrong to hold that the dismissal of the plaintiff by reason of her marriage was a dismissal upon educational grounds.

The defendants appealed.

Rawlinson, K.C. (*W. Mackenzie* with him), for the defendants. The county court judge was wrong in holding that the plaintiff could maintain this action. The plaintiff had no contract with the defendants; her only contract was with the managers. Nothing in s. 7 of the Education Act, 1902 (1), gives any support to the

(1) Education Act, 1902 (2 Edw. 7, c. 42), s. 7: "(1.) The local education authority shall maintain and keep efficient all public elementary schools within their area which are necessary, and have the control of all expenditure required for that purpose, other than expenditure for which, under this Act, provision is to be made by the managers; but in the case of a school not provided by them, only so long as the following conditions and provisions are complied with:

(*a*) The managers of the school shall carry out any directions of the local education authority as to the secular instruction to be given in the school, including any directions with respect to the number and educational qualifications of the teachers to be employed for such instruction, and for the dismissal of any teacher on educational grounds; and, if the managers fail to carry out any such direction, the local education authority shall, in addition to their other powers, have the power themselves to carry out the direction in question as if they were the managers; but no direction given under this provision shall be such as to interfere with reasonable facilities for religious instruction during school hours; . . . .

(*c*) The consent of the local education authority shall be required to the appointment of teachers, but that consent shall not be withheld except on educational grounds; and the consent of the authority shall also be required to the dismissal of a teacher unless the dismissal be on grounds connected with the giving of religious instruction in the school;

(*d*) The managers of the school shall provide the school-house free of any charge, except for the teacher's dwelling-house (if any), to the local education authority for use as a public elementary school, and shall, out of funds provided by them, keep the school-house in good repair, and make such alterations and improvements in the buildings as may be reasonably required

suggestion that any contractual relation is constituted between a teacher in a non-provided school and the local education authority. The fact that the local education authority may, as in this case the defendants did, pay the teachers directly does not alter the fact that the teachers' agreement is with the managers and not with the local education authority: see *Young* v. *Cuthbert*. (1) The authority could discharge their statutory obligation by paying over to the managers a lump sum representing the salaries of the teachers and allowing the managers to distribute that sum among the teachers according to the agreements made with the teachers. The county court judge was therefore wrong in holding that by the payment of the plaintiff's salary direct to her by the defendants there had been a novation. The plaintiff cannot avail herself of the defendants' statutory obligation. If she could, there would have been no necessity for the Education (Local Authority Default) Act, 1904. Even the managers cannot sue the local education authority, special machinery having been provided by the Act for the determination of disputes between the authority and managers. Further, the only obligation on the local education authority is to maintain and keep efficient non-provided schools only so long as the managers comply with the directions of the authority; if those directions are not complied with, the authority is not bound to find any funds for the schools. In this case the defendants, by communicating the resolution of August 4, 1903, gave a direction to the managers which the latter ignored. The defendants are not, therefore, liable to the plaintiff. If the contention for the plaintiff were right that she could sue the local

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by the local education authority; . . . ."

"(3.) If any question arises under this section between the local education authority and the managers of a school not provided by the authority, that question shall be determined by the Board of Education."

"(7.) The managers of a school maintained but not provided by the local education authority shall have all powers of management required for the purpose of carrying out this Act, and shall (subject to the powers of the local education authority under this section) have the exclusive power of appointing and dismissing teachers."

(1) [1906] 1 Ch. 451.

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education authority the managers might break all conditions laid down by the authority with impunity.

Even assuming that there ever was any contract between the plaintiff and the defendants to pay for services rendered by her, that contract was duly determined by the resolution of August 4, 1903, coupled with her marriage; and as regards any further service by her there is no contract under seal. The defendants cannot, therefore, be bound.

Montague Barlow, for the plaintiff. By directing the local education authority to provide the funds for non-provided schools, Parliament has by implication imposed contracts made between managers and teachers upon the authority. But in any view the defendants, by paying the plaintiff direct and taking receipts from her, have assumed responsibility for her salary; and by substituting something—namely, the resolution that marriage of a female teacher shall operate as three months' notice—for the three months in the original agreement, they have modified that original contract and made a new one. There has therefore been, as the county court judge has found in fact, a novation. Of that new contract there has been no determination. The resolution of August, 1903, is not a direction to the managers within the meaning of s. 7, sub-s. 1 (*a*). A "direction" means a direction to the managers to do something. Even, however, if the resolution could be treated as "a direction" and if the managers failed to carry it out, the proper course for the defendants to follow was to carry it out themselves by dismissing the plaintiff or by withdrawing supplies from the school as a whole, and as they did neither they are liable for the salary. Moreover, as the managers, as such, have no right of control, it must be taken that their contract with the plaintiff was made by them as agents for the defendants. With reference to the case of *Young* v. *Cuthbert* (1), it is to be observed that the teacher's salary was not, as in this case, paid direct by the local education authority, but by the managers. That case is, therefore, not in point.

LORD ALVERSTONE C.J. This case is one of extreme difficulty, and I trust that if the view we take of it is not correct it will receive further consideration elsewhere.

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The case brings us face to face with this problem: Is the effect of s. 7 of the Education Act, 1902, to make a personal contract between the local education authority and the teacher, so that the education authority can be sued by the teacher for salary? After the best consideration I have been able to give to this question I am not satisfied that this is the effect of the section. There would have been much force in the plaintiff's argument that a contract should be implied between the local education authority and the teacher from the fact of the payment of the salary by such authority were it not for the provisions of the Act as to the providing of money by the local education authority for the purposes of the managers. Apart from the Act, the change of circumstances might possibly be held to have given rise to a contract between the local education authority and the teacher. Therefore, if the case had to be determined by this kind of consideration, I am not prepared to say that I should have taken a different view from the county court judge, who has held that there was a novation, or, in other words, evidence of a contract by the local education authority to pay for the services of the teacher as long as she was properly employed. If that were so, we should have to consider the effect of the local education authority's action in purporting to limit the employment of teachers on a ground which it might be contended was other than an educational qualification. But we must consider the scheme of the Act, which must be construed in the light of its undoubted intention, and the state of things in existence when it was passed.

The first broad answer to the plaintiff's argument is that it disregards the state of things in existence when the Act was passed. At that time there were teachers in the non-provided schools under contract with the managers, the managers being responsible for the salaries of the teachers. The Act of 1902 made certain changes; it left with the managers the duty of keeping the schools in order, repairing the school-house, &c., it took away from them the obligation of providing the funds; and we have now to consider whether it is a necessary consequence of the provision of those funds by the local education authority that the statute

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has either created a contract between that authority and the teacher, or has imposed a statutory obligation upon that authority to pay a properly-appointed teacher. Does the statute shew any duty on the local education authority to pay the teacher, which duty can be enforced by an action on the case alleging the due appointment of the teacher by the managers, the continuation or rendering of services by the teacher, and either payment by the local education authority or the obligation by it to provide the money and its neglect so to provide? If this were the true view of the statute, and these allegations could be established, I think this action would lie and the plaintiff would be entitled to recover. Bearing in mind, however, what the state of things was before the Act, what does s. 7 provide? Apart from the doctrine of novation, the plaintiff's counsel, in order to make good his contention, must find in that section an obligation by the local education authority to pay personally the teacher. The first words on which he relies are: "The local education authority shall maintain and keep efficient all public elementary schools within their area which are necessary, and have the control of all expenditure required for that purpose, other than expenditure for which, under this Act, provision is to be made by the managers";—that relates, as I have said, to the providing of school accommodation and other matters still left with the owners of the school—"but, in the case of a school not provided by them, only so long as the following conditions and provisions are complied with: (*a*) The managers of the school shall carry out any directions of the local education authority as to the secular instruction to be given in the school, including any directions with respect to the number and educational qualifications of the teachers to be employed for such instruction, and for the dismissal of any teacher on educational grounds; and if the managers fail to carry out any such direction the local education authority shall, in addition to their other powers, have the power themselves to carry out the direction in question as if they were the managers." It must be conceded that, if although a teacher has been appointed by the managers they do not dismiss him when required to do so on educational grounds, the local education authority can themselves dismiss

the teacher. Then occurs a provision as to the determination of any question arising under the section, which includes the question of educational qualification of the teacher, by the Board of Education. The next material sub-section is sub-s. 7, which provides that: "The managers of a school maintained but not provided by the local education authority shall have all powers of management required for the purpose of carrying out this Act, and shall (subject to the powers of the local education authority under this section) have the exclusive power of appointing and dismissing teachers." The power of appointing teachers would seem to carry with it the power of fixing their salaries and making contracts as to these salaries to be paid by the managers. I do not wish to attach too much importance to the practice that contracts with teachers are made by the managers; but it is the fact that they are so made, and it seems to me that the statute recognizes bargains so made by the managers which will involve agreements to pay salaries, control by the managers of the duties of the teachers, and dismissal of teachers by the managers—in other words, there is a recognition by the statute that the ordinary contractual relations between managers and teachers remain as before. Then, do the words "The local education authority . . . . shall have the control of all expenditure required for the purpose of paying the teachers"—I add these latter words—make it necessary that a contract should be implied between the teacher and the local education authority? In my opinion such a contract cannot be implied from the words used. The language points clearly to the provision by the local education authority of funds to meet the demands of the managers under clause (*a*); they are the paymasters of the managers. Looking at the state of things before the Act, and the changes made by the Act, there is, in my opinion, nothing in the section to destroy the prima facie inference of law that the contract of service originally made with the old managers has either been continued with the new managers or that a new contract has been made with them. It is not, therefore, correct to say that the Act imposes a duty on the local education authority to pay salaries which can be enforced by action by individual teachers. There is no privity

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of contract between the teacher and the local education authority; the mere fact of payment of the teachers' salaries direct by the local education authority, which is consistent with the duty the local education authority have to discharge, does not constitute privity of contract between the teacher and the local education authority. The appeal must therefore be allowed.

All I desire to say on the other point, which does not arise for decision in the view I have taken, is that, as at present advised, any question between the local education authority and the managers as regards the qualification of a particular teacher from an educational point of view is a matter to be decided under sub-s. 3 of s. 7 by the Board of Education; it is not a matter which can properly be discussed in a Court of law.

RIDLEY J. I am of the same opinion, and will add only a few words. Apart from s. 7 I should have been inclined to think that although the contract was made with the managers, still, if it could be shewn that there is a statutory obligation on the part of the local education authority to provide the money to fulfil the contract, a declaration or statement of claim might be framed which might be sufficient. But we have to look at s. 7 of the Act more closely for the purpose of determining the question, and it would seem that the obligation of the local education authority is not an absolute one, but only endures so long as the managers carry out the directions of the local education authority as to the secular instruction given in the school. In the present instance a resolution has been passed by the local education authority which affected the position of the plaintiff, but which has not been carried out by the managers; and, as I understand, the consequence of that was that the obligation of the local education authority, which was only in existence so long as the managers carried out their directions, ceased to exist. In my opinion there was nothing to shew a novation.

DARLING J. I am of the same opinion. The question appears to me to depend entirely on s. 7 of the Act. When that section is looked at closely it will be seen that it contains no direct provision for the payment by anyone, neither by the managers nor

by the local education authority, of the teachers' salaries. The only way in which one can collect that these salaries ought to be paid and who is to pay them is by looking at the words of sub-s. 1, where it is said that "The local education authority shall maintain and keep efficient all public elementary schools . . . . and have the control of all expenditure required for that purpose, other than expenditure for which, under this Act, provision is to be made by the managers." As the schools cannot be kept efficient without teachers, it seems to follow from that sub-section that the local education authority are to provide the money to pay the teachers and are to control that expenditure. That gives the authority very great power with regard to the teachers; but there is nothing in the Act to prevent the local education authority, if they think fit, paying over to the managers a lump sum in respect of the teachers' salaries and allowing the managers to distribute it among the teachers according to the agreements which the managers have made with them, because it is the managers who are to engage the teachers. It is true that by clause (*a*) of the same sub-section power is given to the local education authority to exercise some amount of control over the teachers—as to their number and educational qualifications—but still it is left to the managers to engage and dismiss the teachers. Here the local education authority did what I understand is not uncommon, they paid the salaries direct to the teachers, and it is said that because of that there was a contract between the local education authority and the teachers, and that if the salaries are not paid the teachers can sue the local education authority. I do not think that is so, and a dilemma can be put to shew that it cannot be so. Sub-s. 1 goes on to provide that, in the case of a school not provided by them, the local education authority is only liable to maintain and keep it efficient so long as certain conditions and provisions are complied with, and one of these conditions is that the managers shall carry out any directions of the local education authority as to the secular instruction to be given in the school. Suppose the local education authority were to say to the managers of a particular school that some subject, say Greek, was not to be taught, and the managers declined to obey that direction; in such a case the local education authority would be entitled to

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refuse to find the money for the school. If, however, the contention put forward by the plaintiff is right, the local education authority would have no control over the school at all, because the managers would say to the teachers, "We cannot pay you your salaries, because we have not the money, but you are perfectly at liberty to bring actions for them against the local education authority." That would seem to me to be an evasion of that control given to the local education authority which the Act never meant to allow. It looks as if this kind of thing had either happened or that its happening was contemplated, and instead of leaving the teacher to sue the local education authority the Legislature passed the Education (Local Authority Default) Act, 1904, which enables the Board of Education to reimburse the managers' expenses incurred by them in the maintenance of a school for which provision should have been made by the local education authority. It may be that that statute was intended for other purposes as well, but it does seem, as far as it goes, to support the view I have expressed. I am inclined to think that the Legislature thought that the teachers could not sue the local education authority for their salaries, and therefore that statute was necessary. For these reasons I think the appeal must be allowed.

Appeal allowed.

Solicitors for the plaintiff: *Crowders, Vizard, Oldham & Co. for Shelly & Johns, Plymouth.*

Solicitors for the defendants: *Sharpe, Parker & Co., for J. H. Ellis, Town Clerk, Plymouth.*

W. J. B.

THE KING *v.* SOUTHAMPTON JUSTICES.

1906
March 6.

Licensing Acts—County Borough—Compensation Authority—Refusal to renew Licence—Appeal to Quarter Sessions of County—Licensing Act, 1904 (4 *Edw.* 7, *c.* 23), *s.* 8, *sub-s.* 2.

Where the whole body of justices of a county borough acting as the compensation authority under the Licensing Act, 1904, refuse to renew an on licence subject to compensation, no appeal lies from their decision to the quarter sessions of the county under s. 27 of the Alehouse Act, 1828.

MANDAMUS to justices of the county of Southampton to hear an appeal.

On February 21, 1905, Edwin Donkin, who was the licensed occupier of the York Inn, situate in the county borough of Southampton, received a notice of objection to the renewal of his licence upon the ground that the licence was not required in the neighbourhood. In pursuance of that notice he attended at the general annual licensing meeting held for the said county borough and applied for the renewal of his licence. The justices then present, acting as the "renewal authority" within the meaning of the Licensing Rules, 1904, referred the matter of the said renewal under s. 1, sub-s. 2, of the Licensing Act, 1904, to the whole body of justices acting for the borough, together with their report thereon. (1) The whole body of justices of the

(1) By the Licensing Act, 1904, s. 1, sub-s. 1: "The power to refuse the renewal of an existing on licence, on any ground other than the ground that the licensed premises have been ill-conducted, or are structurally deficient or structurally unsuitable, or grounds connected with the character or fitness of the proposed holder of the licence, or the ground that the renewal would be void, shall be vested in quarter sessions instead of the justices of the licensing district, but shall only be exercised on a reference from those justices and on payment of compensation in accordance with this Act."

Sub-s. 2: "Where the justices of a licensing district on the consideration by them, in accordance with the Licensing Acts, 1828 to 1902, of applications for the renewal of licences are of opinion that the question of the renewal of any particular existing on licences requires consideration on grounds other than those on which the renewal of an existing on licence can be refused by them, they shall refer the matter to quarter sessions, together with their report thereon, and quarter

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county borough, acting as the "compensation authority" within the meaning of the Licensing Rules, at their principal meeting held on May 25, 1905, refused the renewal of the licence subject to the payment of compensation under the Licensing Act, 1904. Thereupon Edwin Donkin, as the licensed occupier, and Messrs. Fuller, Smith & Turner, brewers, as the owners of the York Inn, gave notice of appeal against the refusal to the next quarter sessions for the county of Southampton. On June 27 the quarter sessions refused to hear the appeal, on the ground that they had no jurisdiction to entertain an appeal from the compensation authority. A rule nisi having been obtained on behalf of the licensed occupier and the owners of the York Inn for a mandamus to the county justices to hear the appeal,

Duke, K.C., and *J. A. Simon*, shewed cause. Prior to the passing of the Licensing Act, 1904, the question of the renewal

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sessions shall consider all reports so made to them, and may, if they think it expedient, after giving the persons interested in the licensed premises, and, unless it appears to quarter sessions unnecessary, any other persons appearing to them to be interested in the question of the renewal of the licence of those premises (including the justices of the licensing district), an opportunity of being heard, and subject to the payment of compensation under this Act, refuse the renewal of any licence to which any such report relates."

Sect. 5, sub-s. 4: "The justices of a licensing district being a county borough shall exercise their powers under the Licensing Acts, 1828 to 1902, as to the renewal of licences through the borough licensing committee appointed under s. 38 of the Licensing Act, 1872."

Sect. 8, sub-s. 1: "The area of quarter sessions for a county shall for the purposes of this Act include any borough (not being a county borough), or any part thereof which is locally situated in that county."

Sub-s. 2: "This Act shall apply to a county borough as if it were a county, with the substitution for quarter sessions of the whole body of justices acting in and for the borough."

Sect. 10: "This Act . . . . shall be construed as one with the Licensing Acts, 1828 to 1902."

By the Licensing Rules, 1904, made in pursuance of s. 6 of the Licensing Act, 1904. Rule 2: "The 'compensation authority' means as respects a county the quarter sessions for that county, and as respects a county borough, the whole body of justices acting in and for the borough."

"The 'renewal authority' means the justices having power to renew a licence, or, where a committee of justices have power to renew a licence, that committee."

of licences was determined in boroughs by the whole body of the justices acting for the borough, and from a refusal by that body to grant a renewal it is admitted that down to the passing of that Act an appeal lay to the quarter sessions of the county under s. 27 of the Alehouse Act, 1828. The question is whether the effect of the Act of 1904 has been to take away that right of appeal. By s. 1, sub-s. 2, where the justices of a licensing district of a county think that there is a case for refusing the renewal of a licence on the ground that there are too many licences in the district, they are not to refuse it themselves, but are to refer it to the quarter sessions of the county with their report upon it, and the decision of the quarter sessions upon the matter is final. Then by s. 8, sub-s. 2: "This Act shall apply to a county borough as if it were a county, with the substitution for quarter sessions of the whole body of justices acting in and for the borough." And by s. 5, sub-s. 4, the justices of a licensing district being a county borough are to exercise their powers as to the renewal of licences through "the borough licensing committee." The effect of those two sections is that if the borough licensing committee think a particular licence ought not to be renewed on the ground of excess of licensed houses in the borough they are to refer the matter to the whole body of the borough justices, whose decision on the question of renewal is, like that of the quarter sessions in a county, to be final. It is difficult to see why there should be a right to have the decision of the compensation authority reviewed in the case of a county borough when there is no such right of review in a county. It is not disputed that an appeal from a refusal by the borough justices to renew a licence on such a ground as that the premises have been ill-conducted or are structurally deficient still lies to the county quarter sessions, but where the refusal is upon the ground of superfluity of licences the right of appeal is gone.

Pickford, K.C., *Emmanuel*, and *Brodrick*, in support of the rule. The right of appeal given by the Act of 1828 is not expressly abrogated by the new Act, nor is there in it any necessary implication of an intention to abrogate it. No doubt s. 27 of the Act of 1828 only gives a right of appeal to quarter sessions to a

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person aggrieved by an act of a justice "done in or concerning the execution of this Act." But by s. 10 of the Act of 1904 that Act is to be "construed as one with the Licensing Acts, 1828 to 1902." So that the words "this Act" in s. 27 of the earlier Act must be read as including the Licensing Act, 1904. It is to be observed that in county boroughs the body which is to determine questions of renewal since the Act of 1904 is precisely the same body that sat to hear those questions before the Act. For in boroughs, though applications for new licences were heard before the licensing committee, applications for renewals were always heard, as they are now, before the whole body of the borough justices. The only difference introduced by the Act was that there must be a preliminary investigation and report by the licensing committee as a condition of the borough justices' jurisdiction to entertain the matter. But subject to that condition the body which has to adjudicate upon the matter remains the same, and under those circumstances, as there was a right of appeal from its decisions before the Act, there seems to be no reason why the Legislature should have intended to take that right away. The provision of s. 8, sub-s. 2, as to the substitution in county boroughs of the whole body of the borough justices for quarter sessions does not mean that the borough compensation authority is to have all the powers and incidents of the county compensation authority. There are several passages in the Act which conflict with such a supposition. For instance, s. 5, sub-s. 1, enacts that the quarter sessions may divide their area into districts for the purposes of the Act, but that is obviously beyond the power of the borough justices. Again, s. 5, sub-s. 2, requires quarter sessions to delegate their power of determining questions of renewals under this Act to a committee, whereas it seems clear that the borough compensation authority cannot delegate their powers to a committee. It is plain, then, that it was not the intention of the Act to put the compensation authorities in counties and county boroughs on precisely the same footing, and consequently the fact that there is no appeal from the quarter sessions is not a sufficient reason for inferring that there was to be no appeal from the whole body of the borough justices. If there is no appeal from

the borough compensation authority to the quarter sessions there will be no means of testing the correctness of the justices' decision in point of law, for they are not a Court and have no power to state a special case: *Boulter* v. *Kent Justices*. (1) Whereas if the county compensation authority are thought to have made an error in point of law they may be required to state a special case. Therefore, there is a necessity for an appeal in the one case which does not exist in the other.

LORD ALVERSTONE C.J. I am of opinion that this rule must be discharged. Before the year 1904 there existed a right of appeal to the quarter sessions from a refusal by the licensing authority of a county borough to renew a licence, the licensing authority for the purpose of renewal being the whole body of justices for the borough. The question is whether that right of appeal is taken away by the Licensing Act, 1904, so far as a refusal upon the ground that the licence is unnecessary is concerned. That Act does not take it away in express terms. Does it do so by necessary implication? Now the main object of the Act was to cut down the jurisdiction of the justices of the licensing district in respect of renewals, and to limit their right to entertain objections to renewals to certain specified grounds, namely, that the premises are ill-conducted or structurally deficient or unsuitable, or that the proposed licensee is of bad character or otherwise unfit, or that the renewal would be void. The power to refuse renewals upon other grounds, including that of there being too many licences in the particular district, was transferred in the case of counties to the quarter sessions. The Act, in so transferring this power to the quarter sessions, conferred upon the quarter sessions an entirely new jurisdiction—an original, and not an appellate, jurisdiction. At the same time, it did not empower them to exercise that jurisdiction except in the event of a reference to them by the justices of the licensing district of the question of renewing a particular licence, together with a report of the justices upon the case. Subject to that preliminary condition that the licences which

(1) [1897] A. C. 556

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they were going to consider should have been examined and reported upon by the licensing justices, the quarter sessions, and the quarter sessions alone, had to determine whether the licence should be renewed or not. Their decision in the matter was final. So far, then, as the Act applied to counties it was perfectly clear. When the Act deals with county boroughs it provides by s. 8, sub-s. 2, that "this Act shall apply to a county borough as if it were a county, with the substitution for quarter sessions of the whole body of justices acting in and for the borough." And s. 5, sub-s. 4, provides that the "justices of the licensing district," upon whose reference and report the whole body of the borough justices are to act, shall in the case of a county borough mean the "borough licensing committee." The Act, therefore, in dealing both with counties and county boroughs, proceeds upon parallel lines. In each case there is one body which is to examine and report, and another body which is to decide the questions arising out of that report. And as, in the case of counties, the decisions of the quarter sessions are to be final, the inference is that in county boroughs the decisions of the corresponding body who are substituted for the quarter sessions were equally intended to be final.

RIDLEY J. I am of the same opinion. This Act introduced a wholly new course of procedure in cases in which the question of renewal or non-renewal of a licence was dependent upon the wants of the district, inasmuch as it provided that the first body which had to consider the matter should come to no decision upon it, but merely report the results of their consideration to another body who should determine the matter. In counties the justices of the licensing district were, if they thought proper to do so, to refer the matter to the quarter sessions, who were the tribunal to decide whether the renewal should be refused or not, and if refused, what the compensation should be; and what in counties was to be done in the first instance by the justices of the licensing district was in county boroughs to be done by the borough licensing committee, who were to report to the whole body of the borough justices. And the question is whether the decision of the latter body is final for county boroughs, as is the decision of

the quarter sessions on a similar matter for counties. It was contended that there was nothing in the Act of 1904 to take away the right of appeal from the borough justices to the quarter sessions given by s. 27 of the Act of 1828. But I agree with my Lord in thinking that, although the Act does not expressly take it away, its general effect is to render such a right of appeal inconsistent with its own provisions.

DARLING J. I agree. This Act of Parliament starts, and for some way continues, as though it dealt with counties only, and provides that in the class of cases with which it was intended to deal the question of the renewal of licences should be referred by the justices of the licensing district to the quarter sessions of the county for decision. To this end the county is treated as excluding county boroughs, although it includes boroughs which are not county boroughs. Then s. 8, sub-s. 2, says: "This Act shall apply to a county borough as if it were a county"—that is, it puts a county borough for the purposes of the Act upon the same footing as a county—"with the substitution for quarter sessions of the whole body of justices acting in and for the borough." In other words, it confers upon the whole body of justices in a county borough the same jurisdiction to decide questions of renewal as it confers upon quarter sessions in a county; and in my opinion it was intended to make the decisions of both bodies equally final. But then it was argued that if that is so, and if the appeal which before the Act of 1904 lay in licensing matters from the justices of a county borough to the county quarter sessions is to be treated as taken away, the parties in a county borough will be at the disadvantage of being unable to question the legality of the tribunal's decision upon a case stated; for whereas in the case of a county the quarter sessions have power to state a special case, in a county borough the justices, sitting as a licensing body, have no such power. Though it is, perhaps, not necessary for me to decide that point, I may say that I disagree with that contention. I think that the borough justices would have power to state a case. I think the intention of the Legislature was that they should within the county borough

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have the same powers as those the quarter sessions have within the county.

Rule discharged.

Solicitors for the prosecutors: *Godden, Son & Holme, for Lamport, Bassitt & Hiscock, Southampton.*

Solicitors for the justices: *Robbins, Billings & Co., for H. Barber, Winchester.*

J. F. C.

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March 9.

LONDON AND SOUTH WESTERN RAILWAY COMPANY *v.* HILLS.

London—Water-closets—Repairing Apparatus of existing Water-closets—Requirement of Notice to Sanitary Authority before doing so—Public Health (London) Act, 1891 (54 & 55 *Vict. c.* 76), *s.* 39, *By-laws under—By-laws* 5, 14.

By by-law 14 of the by-laws made under s. 39 of the Public Health (London) Act, 1891: "Every person who shall intend to construct any water-closet . . . . or to fit or fix in or in connection with any water-closet any apparatus or any trap or soil pipe, shall before executing any such works give notice in writing to the clerk of the sanitary authority":—

Held, that the by-law applied to a person intending to renew the pan or trap of a water-closet constructed before, as well as of a water-closet constructed after, the making of the by-law.

CASE stated by a metropolitan police magistrate.

The appellants, the London and South Western Railway Company, were summoned to answer a complaint preferred on behalf of the council of the borough of Wandsworth charging that the appellants did unlawfully fit or fix in connection with certain water-closets at Earlsfield Station an apparatus or trap without first giving notice of their intention to do so to the said council as the sanitary authority of the borough, contrary to the by-laws of the London County Council made under s. 39, sub-s. 1, of the Public Health (London) Act, 1891.

By by-law 3 of the said by-laws it was provided that every person who shall construct a water-closet in connection with a building, shall furnish it with a sufficient flushing cistern, with a suitable pan, with suitable apparatus for the effectual application of water to the pan, and with an efficient syphon trap.

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By by-law 5: "A person who shall newly fit or fix any apparatus in connection with any existing water-closet, shall, as regards such apparatus and its connection with any soil pipe or drain, comply with such of the requirements of the foregoing by-laws as would be applicable to the apparatus so fitted or fixed if the water-closet were being newly constructed."

By by-law 14: "Every person who shall intend to construct any water-closet, earth-closet or privy, or to fit or fix in or in connection with any water-closet, earth-closet or privy any apparatus or any trap or soil pipe, shall, before executing any such works, give notice in writing to the clerk of the sanitary authority."

Earlsfield Station is a station on the appellants' railway which was erected in or about the year 1884, and is within the district of the council of the borough of Wandsworth. When the station premises were erected certain water-closets were constructed thereon, and the appellants in or about February, 1905, when painting and repairing the station premises, finding that the pans and traps of two of the water-closets required renewal owing to ordinary wear and tear, removed them and fitted two new pans and traps in connection with the said water-closets.

In carrying out the said work the appellants complied with by-law 3.

It was contended on behalf of the appellants that by-law 14 did not apply to the case of renewal or repair of an existing water-closet, but applied only where a person intends to construct a new water-closet or to fit or fix in connection with such a water-closet any apparatus, trap or soil pipe.

The magistrate was of opinion that by-law 14 applied to every case in which a person intended to fit or fix in connection with any water-closet, whether to be constructed or already existing, any apparatus, trap or soil pipe, and he accordingly convicted the appellants subject to a case for the opinion of the Court.

Avory, K.C., and *Courthope-Munroe*, for the appellants. By-law 14 only applies to new water-closets. The first clause provides that a person intending to construct a water-closet after the making of the by-law shall give notice; and then the by-law goes on to provide that in the event of a closet, which has been

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duly constructed after proper notice given in accordance with the first clause, getting out of order and requiring new apparatus to be fitted, a second notice must be given before the fitting is commenced. The words "any water-closet" in the second clause mean "any such water-closet" as in the preceding clause mentioned. The requirements as to the fitting of new apparatus to closets existing at the time of the making of the by-law had already been dealt with in by-law 5, which requires that in such a case the provisions of by-law 3 shall be satisfied; and that the magistrate has found was done in the present case. If the decision of the magistrate is to be upheld, then every time a householder wanted to repair the handle or chain-pull used for flushing the pan he would have to give notice to the sanitary authority, which would be absurd.

Sylvain Mayer, for the respondent. The second clause of by-law 14 applies to old closets as well as new. For the language is perfectly general, and the Court is not entitled to read in the word "such" as suggested. If it does not apply to old closets the beneficial effect of the by-law will be practically destroyed, for the proportion of closets constructed since the making of the by-law is minute as compared with those constructed before it. It is conceded that notice would not be necessary before mending a handle or chain, because such things would not be included within the term "apparatus," as used in this by-law. The ordinary rule of construction is that associated words must as far as possible be construed as referring to things of the same class. And the word "apparatus," when followed by "trap or soil pipe," must be read as referring to something of a kindred nature, something directly connected with the drain. It would include a pan, but not a chain.

Courthope-Munroe, in reply.

RIDLEY J. In this case the appeal is against a decision of a magistrate convicting the appellants of a breach of by-law 14 of the by-laws made under the Public Health (London) Act, 1891. It appears that the appellants in 1905 refitted new pans and traps to two water-closets which had been constructed before the by-law was made. And the question is whether the by-law

applies to the fitting of new apparatus to an old water-closet, or whether it only applies to new water-closets. The by-law provides that "Every person who shall intend to construct any water-closet . . . . or to fit . . . . in connection with any water-closet . . . . any apparatus or any trap or soil pipe, shall, before executing any such works, give notice in writing to the clerk of the sanitary authority." The first part of the by-law in terms only applies to new closets to be constructed; the latter part is ambiguous, and might be read either as applying to both old and new, or as limited in its application to the kind mentioned in the preceding clause. Mr. Avory contended for this latter construction. He argued that the words "any water-closet" in the second part of the by-law ought to be read as meaning "any such water-closet," that is to say, "any water-closet intended to be constructed." But I do not think under the circumstances that we are justified in reading the word "such" into the by-law, but rather read the by-law as applying to any water-closet, old or new. It was said that this construction would lead to great inconvenience, if the smallest alteration in the way of repairs could not be done without sending notice to the sanitary authority. But I think that the suggested inconvenience may be avoided if a reasonable construction be put upon the term "apparatus." I think that expression must be understood as limited to those things which upon renewal would, if inefficiently renewed, be liable to render the premises insanitary. Thus I do not think that a handle or chain-pull would be part of the apparatus in that sense. For if they were broken the replacing of those articles, however badly it was done, would not cause the premises to be insanitary. But the renewal of a pan, or trap, or soil pipe, or ventilation pipe stands on a different footing. And I think it is not unreasonable to infer that the Legislature intended notice to be given to the sanitary authority before things of that description were fitted even in connection with an existing water-closet. The appeal must be dismissed.

DARLING J. The question is whether the latter half of by-law 14 applies to old water-closets as well as to new ones, and I have come to the conclusion that it does. That being so, the by-law

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would apply to this case, unless it is bad as being an unreasonable by-law. If it is to be read as confined to things like pans, traps, and pipes, which if badly constructed might allow of the escape of sewer gas, I see nothing unreasonable in it. I cannot think there is anything unreasonable in requiring a person who proposes to put a new pan or trap into an existing water-closet to give notice before doing it to the sanitary authority. If, however, it were to be read as applying to the putting in of a new handle or a new piece of chain, I think it would be unreasonable. But I agree in thinking that it does not affect such trifles.

Appeal dismissed.

Solicitors for appellants: *Bircham & Co.*
Solicitor for respondent: *W. W. Young.*

J. F. C.

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March 7.

MOSES, APPELLANT *v.* IGGO, RESPONDENT.

Fishery Acts—Fishery District—River—Tributary, What is—Mill Dam—Salmon Fishery Act, 1865 (28 *&* 29 *Vict. c.* 121), *s.* 35—*Freshwater Fisheries Act*, 1878 (41 *&* 42 *Vict. c.* 39), *ss.* 6, 7.

From a stream, which was a tributary of a salmon river, a mill race was conducted to certain mills. For the purpose of increasing the water-power to the mills a triangular mill pond was constructed opening out of the mill race, and the water flowed backwards and forwards from the pond to the mill race, the water in the pond and race being always at the same level. All the water ultimately, after turning the mills, returned to the stream:—

Held, that the mill pond was a tributary of the stream, and that persons fishing in it required a licence from the fishery board of the district.

CASE stated by justices.

The appellant, who was a water bailiff in the employ of the Yorkshire Fishery Board, preferred an information against the respondent under s. 35 of the Salmon Fishery Act, 1865 (28 & 29 Vict. c. 121), as extended to trout and char by ss. 6 and 7 of the Freshwater Fisheries Act, 1878 (41 & 42 Vict. c. 39), for that the respondent, on April 29, 1905, at Storr's Bridge Mill Dam, near Loxley, in the West Riding, being a place within the geographical

limits of the Yorkshire Fishery District, after the time appointed by law in that behalf there unlawfully did with rod and line fish for trout without a proper licence.

The following facts were admitted or proved:—

Storr's Bridge Mill Dam is within the geographical limits of the Yorkshire Fishery District, and is a three-cornered dam built between the river Loxley and the mill race feeding Storr's Bridge Mill for the purpose of increasing the water-power to the mill. The water from the river enters the mill race by an opening in the bank, and the mill dam is fed from the mill race through another opening in the bank of the mill race which is about a yard wide, across which there is a vertical grating of iron bars about an inch apart. There is no clough to hold up the water in the dam, which is about five feet deep, being some twelve inches deeper than the mill race. The water flows to and fro through the opening between the race and dam without hindrance. The dam contains trout, to which the grating is little or no obstruction. When the level of the water in the mill race is reduced below the level of the water in the dam the water in the latter returns to the mill race and thence either passes over the mill wheel and through the mill cloughs direct into the river or continues to flow down an extension of the mill race, giving water-power to other mills, and so eventually all the water returns to the river some half mile or so below Storr's Bridge Mill Dam. There is a pipe in the dam bottom by which the water in the dam may be emptied into the river. There are no other outlets for the water in the dam. The whole of the water from time to time entering the dam eventually returns to the river Loxley, from which it was originally diverted. The river Loxley is a tributary of the river Don, which is a tributary of the river Ouse, which is a river containing salmon.

The limits and bounds of the Yorkshire Fishery District were originally defined and declared by the Home Secretary by certificate granted by virtue of the powers given by the Salmon Fishery Acts, 1861 to 1873, and in that certificate were declared to comprise, inter alia, "so much of the rivers Derwent, Wharfe, Nidd, Ure, Swale, Ouse, and Humber and their tributaries as

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lies within the county of York"; but the limits of the fishery district were subsequently by certificate dated January 21, 1896, of the Board of Trade, acting under the powers conferred by s. 3 of the Salmon and Freshwater Fisheries Act, 1886 (49 & 50 Vict. c. 39), altered, extended, and defined as follows: "The limits of the rivers Derwent, Wharfe, Nidd, Ure, Swale, and Ouse and the fishery district of the said rivers includes all such estuaries, rivers, streams, brooks, lakes, ponds, canals, dykes, cuts, drains, channels, watercourses, and waters as lie within" certain limits and boundaries set forth and described in the certificate. Storr's Mill Dam is within these limits, and it was admitted that the respondent was fishing in the dam without a licence on the date in question. The respondent contended that the mill dam in which he was fishing was an artificial reservoir and not a tributary of the river Don, and was therefore not within the limits of the fishery district, and that, therefore, he did not require a licence from the Yorkshire Fishery Board to fish for trout in the dam.

The justices dismissed the information, but stated this case for the opinion of the Court.

Willis Bund, for the appellant. The justices mistook the effect of the decision in *Stead* v. *Nicholas*. (1) That case only decided that an artificial reservoir was not within the jurisdiction of the fishery board, although situate within its territorial limits. The real question is whether this mill dam was not a tributary of the river Don. There is no definition of "tributary" in the Acts, but where all the water which enters a dam or reservoir returns ultimately to the river, the fact that the stream is detained for a while in the dam or reservoir does not make it the less a tributary. In *Harbottle* v. *Terry* (2) only the surplus water returned to the river, and the rest was taken in reservoirs and used, and that was the ground of the decision that the reservoirs were not tributaries: *George* v. *Carpenter*. (3) Where water is dammed up so as to form ponds, and ultimately gets into its old channel and joins the river,

(1) [1901] 2 K. B. 163. (2) (1882) 10 Q. B. D. 131.
(3) [1893] 1 Q. B. 505.

it is a tributary. That was so decided by the Court in *Cook* v. *Clarebrough*. (1)

Israel Davis, for the respondent. The mill dam is a pond by the side of the river, and cannot be for this purpose within the jurisdiction of the fishery board: *Stead* v. *Nicholas*. (2) It is not a tributary, as it has ceased to be running water and is impounded for a commercial purpose: *Harbottle* v. *Terry*. (3) When water ceases to run in its natural channel and has been diverted it can no longer be regarded as the tributary of a river: *George* v. *Carpenter*. (4)

Willis Bund, was not called upon to reply.

LORD ALVERSTONE C.J. The learned magistrates have mistaken the application of *Stead* v. *Nicholas* (2) and *Harbottle* v. *Terry*. (3) They find as facts in the case: "When the level of the water in the mill race is reduced below the level of the water in the dam the water in the latter returns to the mill race, and thence either passes over the mill wheel and through the mill cloughs direct into the river or continues to flow down an extension of the mill race, giving water-power to other mills, and so eventually all the water returns to the river some half a mile or so below Storr's Bridge Mill Dam. There is a pipe in the dam bottom by which the water in the dam may be emptied into the river." I do not rely upon the existence of this pipe, because the casual power to return the water would of course not of necessity make the water in the dam a tributary. In this case the mill dam and the mill race must be put in the same category. To both of them the same test must be applied. The water is going to be used for commercial purposes, namely, driving a mill. There is, in my opinion, no analogy between the using of the water for the commercial purpose of driving a mill, and then allowing the water to return to the stream from which it was taken, and the diversion of water into a reservoir from which reservoir the water is taken for the purpose of watering a town, or for some

(1) March 27, 1903 (unreported), referred to in the 42nd Annual Report of the Inspectors of Fisheries for England and Wales (presented April, 1903), at p. 51.
(2) [1901] 2 K. B. 163.
(3) 10 Q. B. D. 131.
(4) [1893] 1 Q. B. 505.

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Lord Alverston C.J.

purpose of that kind where the water taken does not return as river water to its channel. The case of *Cook* v. *Clarebrough* (1) is really in point. The only distinction that could be urged is that here the effect of the dam is to send the water into what may be called a temporary excrescence from the river, instead of damming it up in its actual original bed, as was the case in *Cook* v. *Clarebrough*. (1) In my judgment there is no distinction in principle, and I think that this case should go back with a direction to the magistrates to convict.

RIDLEY J. I agree.

DARLING J. I am of the same opinion. It could not be contended that the mill race itself would not be a tributary of this stream out of which it issues, and to which it very quickly returns, and it appears to me that this thing which is called a mill dam is really nothing but a bay in the course of the mill race. The water in it is absolutely free to run into and out of the mill race; it must always be at exactly the same level as the water in the mill race, and I regard it as nothing but a part of the mill race itself. As no one can contend that the mill race is not a tributary of this stream, so the portion of it in question in this case is also a tributary, and, therefore, within the jurisdiction of the fishery board.

Appeal allowed.

Solicitors for appellant: *Steavenson & Couldwell, for J. Edmund Jones, York.*

Solicitors for respondent: *Halse, Trustram & Co., for A. Muir Wilson, Sheffield.*

(1) See note (1), ante, p. 519.

A. P. P. K.

MAYOR, &c., OF HORNSEY, Appellants *v.* BIRKBECK FREEHOLD LAND SOCIETY, Respondents.

1906
March 7

Local Government—Street—Making-up—Power to Charge Frontagers residing outside Limits of Local Authority—Public Health Act, 1875 (38 & 39 *Vict. c.* 55), *s.* 150.

A local authority has no jurisdiction under s. 150 of the Public Health Act, 1875, to charge a proportion of the expenses of making up a street on the owners or occupiers of premises which, though fronting adjoining or abutting on the street, are outside the boundary of the local authority.

Case stated by justices.

The appellants were the local authority for the borough of Hornsey, and the respondents were the owners, within the meaning of the Public Health Act, 1875, of the premises adjoining or abutting on the footpath on the north side of the Birkbeck Road. The Birkbeck Road is a highway not repairable by the inhabitants at large, and it runs east and west. The boundary between the appellants' borough and the urban district of Friern Barnet runs along the line of the kerb of the footpath on the north side of the Birkbeck Road, so that the carriageway and the footpath on the south side are in the appellants' borough, and the footpath on the north side is outside the appellants' borough and within the urban district of Friern Barnet.

In July 1903, the appellants, purporting to act under the Public Health Act, 1875, served notice on the respondents, inter alios, requiring them to level, pave, metal, flag, channel, and make good the parts of the Birkbeck Road within the appellants' borough, and on their failing to do so carried out the works themselves and endeavoured to recover the apportioned cost from the respondents. About the same time the urban district council of Friern Barnet served notice on the respondents with regard to the footpath on the north side of the Birkbeck Road, and executed the necessary works. The respondents paid the amount apportioned on them in respect of the expenses of these works, but refused to pay the amount apportioned on them by the appellants in respect of works on those parts of the Birkbeck

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Road which lay within the appellants' borough, on the ground that their property, being outside the appellants' borough, was under no liability for the maintenance of the road within the borough. There are soil and surface-water sewers running through that part of the Birkbeck Road which is within the borough of Hornsey. These sewers form part of the main drainage system of that borough, and are vested in the appellants. The houses on the south side of the road drain into these sewers, but the houses on the north side drain into a sewer running along that part of the road which is within the Friern Barnet urban district, and which has been recently constructed by the district council at the request and at the cost of the owners of premises on the north side of the road.

The justices dismissed the complaint of the appellants, and stated this case for the opinion of the Court. (1)

Macmorran, K.C. (*A. F. Jenkin* with him), for the appellants. Sect. 150 of the Public Health Act, 1875, contemplates the work of paving, &c., of streets, as being done by "the owners and occupiers of the premises, fronting, adjoining, or abutting" on them, and it makes no difference that those premises are outside the district of the particular local authority. The improvement is for the benefit of the frontagers, whether they are within the borough or not: *Wakefield Sanitary Authority* v. *Mander*. (2) The fact that the footpath intervenes between the respondents' premises and the portion of the street in the appellants' borough

(1) By the Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 150: "Where any street within any urban district (not being a highway repairable by the inhabitants at large) or the carriageway footway or any other part of such street is not sewered levelled paved metalled flagged channelled and made good . . . . to the satisfaction of the urban authority, such authority may, by notice addressed to the respective owners or occupiers of the premises fronting, adjoining, or abutting on such parts thereof as may require to be sewered levelled paved metalled flagged or channelled . . . . require them to sewer level pave metal flag channel or make good . . . . the same within a time to be specified in such notice. . . . . If such notice is not complied with, the urban authority may, if they think fit, execute the works mentioned . . . . therein, and may recover in a summary manner the expenses incurred by them in so doing from the owners in default. . . . ."

(2) (1880) 5 C. P. D. 248

does not prevent those premises from being within the Act as abutting on the street: *Wakefield Local Board* v. *Lee* (1); *London County Council* v. *Collins*. (2)

Alexander Glen, K.C. (*Naldrett* with him), for the respondents. The appellants have no right to apportion the expenses of making up a street in their borough on premises which are outside the limits of that borough. The respondents would have no voice in deciding what ought to be spent on the road, as they are unrepresented on the Hornsey Borough Council. A local authority has no power to assess property out of the limits of their local jurisdiction: *Reg.* v. *Warner*. (3) Whenever it is intended that one local authority should charge expenses on persons outside its district special provision is made under the Public Health Act, 1875 (s. 48, ss. 91—98, s. 108, s. 16, ss. 21, 22): *Reg.* v. *Cotton* (4); *Hayward* v. *Lowndes* (5); *Withington Local Board* v. *Corporation of Manchester*. (6) Birkbeck Road really consists of two streets, and the parts lying respectively in the Friern Barnet urban district and the borough of Hornsey ought to be treated separately: *Richards* v. *Kessick* (7); *Property Exchange* v. *Wandsworth Board of Works*. (8)

Macmorran, K.C., in reply, referred to *Clerkenwell Vestry* v. *Edmondson & Son*. (9)

LORD ALVERSTONE C.J. In my opinion this decision is right and the appeal fails. There are two or three broad considerations which guide us as to the meaning of the section. Prima facie the powers and authorities of these statutory bodies are to be exercised within their own districts. No doubt, by express enactment or by necessary implication they may be given powers outside their districts, but the question is whether or not in this case the language of the section is so plain that we ought to hold that either by express enactment or reasonable implication this authority had power to charge people outside its district.

(1) (1876) 1 Ex. D. 336.
(2) (1905) 3 Knight's Local Government Reports, 1103.
(3) (1858) 27 L. J. (M.C.) 144.
(4) (1858) 1 E. & E. 203.
(5) (1859) 28 L. J. (Ch.) 400.
(6) [1893] 2 Ch. 19.
(7) (1888) 57 L. J. (M.C.) 48.
(8) [1902] 2 K. B. 61.
(9) [1902] 1 K. B. 336.

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Lord Alverstone C.J.

No doubt there is some ground for saying that roads are made up largely for the benefit of the people who live by the side of them. The Legislature has recognized that by requiring the making-up of the roads not to be thrown as a burden upon the general body of ratepayers, but upon the particular individuals. To a certain extent that is qualified by the exception of highways repairable by the inhabitants at large, but it still leaves the section with regard to all the other roads in full force. When the street is in a condition which is not to the satisfaction in certain respects of the urban authority, they may, by notice addressed to the respective owners or occupiers of the premises fronting, adjoining or abutting on the road, require them to sewer, level, pave, &c., the road within the time specified. Now, if that means individuals independently of the district in which their premises are situate, the contention of the Hornsey Borough Council is right. But in my opinion there are other words in the section which to a certain extent qualify that proposition. In the first place, the urban authority may do the work themselves, and may recover the apportionment which is to be settled by their surveyor from the frontagers. Then the urban authority may by order declare the expenses so incurred to be private improvement expenses. Those matters seem to me to be rather in favour of the view that the local authority are dealing entirely with local matters within their district. If it were otherwise I do not quite see why the surveyor of the other district should have no voice in the apportionment of the expenses. So, as to private improvement expenses, the authority which is to take the necessary steps for recovering private improvement expenses, is the authority by whom the work has been done. So, again, the plans are to be deposited in the office of the urban authority which does the work. To a certain extent that point might be met by the fact that notice is to be given to the frontagers, but still at the same time it supports the view that the section deals with things which are to be done within the district. Therefore, inasmuch as it lies upon the appellants to establish the right of the urban authority to charge people outside their district, the language of the section is not, in my judgment, sufficient to give them this power by necessary implication; and certainly it does

not do so by express enactment. I am a good deal pressed by the principle of the previous cases, and the argument upon the other parts of this statute. With regard to *Reg.* v. *Warner* (1) the decision in that case, although no doubt it turned to some extent on the proviso to the section there in question, does indicate the broad principle that one district could not tax or charge the inhabitants of another. Then when I look at the legislation of 1875, there are a number of sections in the Public Health Act as to sewers and as to nuisances which deal specially with the cases in which it is proposed to put a burden upon an outlying district, and therefore indirectly upon the inhabitants of that district. I have therefore come to the conclusion that the appellants have failed to satisfy us that there is a statutory power, either expressed or by necessary implication, which enables the inhabitants of Hornsey to charge the inhabitants of Friern Barnet, and that the appeal should be dismissed.

RIDLEY J. I agree. I must say I was rather impressed by the argument that the authority in this case have done nothing except in their own district—that they have made up a road and footpaths in their own district. There is, no doubt, authority in them to do that, but the question is not as to the doing of anything, but as to the assessing upon the owners or occupiers of premises fronting, adjoining, or abutting on such parts thereof as may require to be sewered, and so forth, the expenses that are necessary; and it is argued that although in doing that the local authority go outside their own district, they go no further than the frontagers who will get the benefit of the work that is being done.

One does not see that there is any enormity in that proceeding, nor any hardship upon persons who happen to live in Friern Barnet. But I feel convinced that, in order to enable the authority to go outside their own district, there ought, after all, to be more precise and more certain words than we can find in this statute. I think, in the absence of those words, it is much the safer course to hold that the local authority cannot

(1) 27 L. J. (M.C.) 144.

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do so. One would expect, where such a thing was contemplated at all by the Act, that it would be dealt with, as it was dealt with in the Nuisances Removal Act of 1855, upon which the case of *Reg.* v. *Warner* (1) was decided. That case is in favour of the view which we are taking, namely, that unless there be something in the Act of Parliament to extend the jurisdiction of a local authority it must be regarded as purely local. Here there are no such words, and in the absence of such words I think the safer course is to say that there is no jurisdiction to assess these charges outside the boundaries of the district.

DARLING J. I am of the same opinion. To my mind s. 150 did not contemplate the case which has arisen here, and when it used the words making the owners of property fronting upon the road to be repaired liable, I think it simply had regard to property within the jurisdiction of the authority repairing the road. I think the matters to which my Lord has called attention point in that direction. I have very little doubt that, if it had occurred to Parliament, some such provision as would have enabled the appellants to succeed here would have been embodied in that section; but as that was not done we have no alternative but to dismiss this appeal.

Appeal dismissed.

Solicitor for appellants: *L. J. Tatham.*
Solicitors for respondents: *Rubinstein & Co.*

A. P. P. K.

(1) 27 L. J. (M.C.) 144.

SUCKLING, Appellant; PARKER, Respondent. 1906 *March* 8.

Adulteration—Analysis—Deterioration of Sample—Analysis by Commissioners of Inland Revenue at request of Vendor — Impossibility — Condition precedent to Conviction—Sale of Food and Drugs Acts, 1875 (38 & 39 *Vict. c.* 63), *ss.* 9, 14, 21 ; 1899 (62 & 63 *Vict. c.* 51), *s.* 21.

On the hearing of a complaint charging the appellant with selling milk in an altered condition contrary to s. 9 of the Sale of Food and Drugs Act, 1875, it having been proved by the analysis of the public analyst (who was not required by the appellant to be called as a witness) that the milk was deficient in butter fat, the appellant required that the sample of the milk, which had been retained by the purchaser in accordance with s. 14 of the Act, should be produced and sent to the Commissioners of Inland Revenue for analysis under s. 21 of the Sale of Food and Drugs Act, 1899. The sample, which had been placed in a bottle, was produced, but the cork of the bottle having become loose, the sample was in consequence in such a condition as to make a satisfactory analysis impossible. The appellant was convicted:—

Held, that it was not a condition precedent to a conviction that the retained sample should have been analysed ; but that in order to support the conviction there must be a finding of fact by the magistrate that the sample had been sealed or fastened up in such manner as its nature would permit, as provided by s. 14 of the Act of 1875, and the case was therefore remitted to the magistrate.

Hutchison v. *Stevenson*, (1902) 4 F., J.C., 69, distinguished.

Case stated by a metropolitan magistrate.

On April 14, 1905, a complaint was preferred by the respondent against the appellant under s. 9 of the Sale of Food and Drugs Act, 1875, charging the appellant with having on April 9, 1905, sold an article of food, to wit, milk which was injuriously affected in its quality, substance or nature by being altered by there being 12 per cent. less than the proper proportion of butter fat, without making disclosure of the alteration to the respondent.

The complaint was part heard on May 26, 1905, and adjourned to June 9, 1905, when the magistrate convicted the appellant. The following facts were proved:—The appellant was a milkman carrying on business at 2, Ashburnham Road, Kensal Rise, and on April 9, 1905, he received a consignment of milk at Willesden Junction Station. The consignment consisted of fifty-one churns, ten of which were marked "separated milk" and contained

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milk from which the cream had been removed, and the remainder of which contained new milk, that is to say, milk from which the cream had not been removed. The appellant was seen by a railway porter at the station to take milk from one churn and put it into another, but the porter was unable to identify any particular churns as those whose contents were so mixed, and he admitted in cross-examination that he could not say that separated and new milk was mixed together that morning, or that any milk was taken out of either of the ten churns containing separated milk. On the same day a pint of the milk was purchased from one Broad, a man in the appellant's employment. The pint of milk was then given to the respondent, who informed the appellant's man that he was an inspector under the Sale of Food and Drugs Act, and that the pint of milk had been purchased for analysis and that it was his intention to have the same analysed by the public analyst.

The respondent thereupon, in accordance with the provisions of the Act, divided the pint of milk into three parts, each of which parts he poured into a separate bottle; he then placed in each of the bottles a cork, and upon each cork he placed a seal, and upon each of the bottles he also placed a mark. The respondent delivered one of the bottles to Broad and retained the other two bottles, one of which he subsequently sent for analysis, the other of which he retained.

At the hearing of the complaint on May 26, 1905, the certificate of the public analyst was produced by the respondent; the certificate shewed that the sample submitted to the analyst was deficient in butter fat to the extent of 12 per cent.

The appellant did not require that the analyst should be called as a witness.

The appellant's solicitor called for the production of the third sample, which was not then in Court, but was subsequently produced. Upon this sample being produced it appeared that the cork had been partly forced out of the bottle owing to the fermentation of the milk, and part of the contents of the bottle had escaped. The cork had not been secured in the bottle by string or other ligature.

The appellant's solicitor thereupon contended that the sample

had not been sealed or fastened up or retained in accordance with the provisions of s. 14 of the Sale of Food and Drugs Act, 1875, and that no conviction could, therefore, follow.

The magistrate overruled the objection, and at the request of the appellant the bottle was duly sent to the Commissioners of Inland Revenue for analysis, and the case was adjourned for their report.

At the adjourned hearing of the complaint on June 9, 1905, a letter from the Commissioners was produced, in which it was stated that an examination of the bottle shewed that the cork was loose and portions of fat and dried milk were adhering to the outside of the bottle and the paper wrapper, and that under those circumstances a satisfactory examination of the milk was not possible, and that the analysis could not, therefore, be carried out by the department.

The appellant's solicitor thereupon contended that when (as in this case) a request had been made for the analysis of the third sample, such analysis was a condition precedent that must be fulfilled before the magistrate could convict.

The appellant did not tender any evidence, and the magistrate was satisfied, and found as facts, that the milk sold by Broad as aforesaid was milk from which a portion of the cream had been removed, and that the milk had been sold as new milk, that is to say, as milk from which no cream had been removed, without disclosure being made of the abstraction. He accordingly convicted the appellant of the offence.

The questions for the opinion of the Court were :—

(*a*) Was the magistrate right in convicting the appellant of the offence, notwithstanding the absence of analysis by the Commissioners of Inland Revenue?

(*b*) Was the fact that the bottle containing the sample retained by the inspector and produced at the hearing had not been so sealed or fastened up as to prevent the cork being forced out and part of the contents of the bottle escaping fatal to a conviction?

Clarke Hall, for the appellant. The conviction was wrong. By s. 14 of the Sale of Food and Drugs Act, 1875, as amended by s. 13 of the Sale of Food and Drugs Act, 1899, the purchaser of

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an article for analysis must divide it into three parts, and deliver one to the vendor, submit one to the public analyst, and retain one "for future comparison." Then s. 21 of the Act of 1875 provides that the part retained shall be produced at the hearing, and under s. 21 of the Act of 1899, amending s. 22 of the earlier Act, an "article of food," which, it is submitted, means the part retained, shall, if the accused so requests, be sent to the Commissioners of Inland Revenue for analysis. It is therefore a condition precedent to a conviction that the part retained shall not only be produced at the hearing, but that when produced it shall be in such a condition that analysis of it is possible, for the only object in producing it is that it may be analysed. In the present case analysis of the part retained was impossible, and, therefore, the appellant ought not to have been convicted. Under s. 22 of the earlier Act the Court was not bound to send the third sample for analysis, but s. 21 of the Act of 1899 makes it obligatory on the justices to do so, if the vendor so desire, thus shewing that the section was intended to provide an additional protection for the vendor. The authorities are entirely in the appellant's favour. In *Lowery* v. *Hallard* (1) the Court held that each of the three parts into which the article has to be divided must be sufficient in quantity to admit of analysis, and as a reason for coming to that conclusion Lord Alverstone C.J. pointed out that the part retained by the purchaser would, if the vendor desired it, have to be analysed. Again, in *Hutchison* v. *Stevenson* (2), where a bottle containing the third sample had burst, and consequently could not be produced at the hearing, it was held for the same reason that the conviction could not be supported. Secondly, s. 14 of the Act of 1875 says that each part of the article purchased shall be "sealed or fastened up in such manner as its nature will permit." If the impossibility of analysing the third sample resulted from a non-compliance with those provisions, the appellant ought not to have been convicted; but the magistrate has not found as a fact what caused the escape of the milk, and the case ought, therefore, to go back for a further finding on this point.

(1) Ante, p. 398. (2) 4 F., J.C., 69.

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Bethune (*R. C. Glen* with him), for the respondent. This is a purely technical point, only taken on behalf of the appellant when the condition of the third sample was ascertained. The appellant did not require the analyst to be called as a witness, and, therefore, under s. 22 of the Sale of Food and Drugs Act, 1899, the analysis was sufficient evidence of the facts therein stated; and, that being so, an analysis of the third sample was not required for the purpose of comparison. Sect. 21 of the Act of 1875 was complied with by the production of the part of the article retained by the purchaser. The appellant says that the sample when produced must be in a condition capable of analysis. There is nothing in s. 21 to support that view. Sect. 22 of the Act of 1875 and s. 21 of the Act of 1899 do not refer to the third sample; they merely say that "an article of food or drug" is to be sent to the Commissioners for analysis. The appellant strives to read that section as meaning that it is the third sample, and that only, which is to be sent; but when the Act is intending to refer to the third sample language is used which clearly indicates that intention, as, for example, in s. 21 of the Act of 1875, which speaks of "the parts of the articles retained" by the purchaser.

Clarke Hall, in reply. The latter words of s. 14 of the Act of 1875 shew that the "article of food" mentioned in s. 22 can only mean the third sample. It is difficult to see what else can be referred to, or what object is served by retaining the third sample if it is not subsequently to be analysed.

RIDLEY J. In this case the appellant has been convicted under s. 9 of the Sale of Food and Drugs Act, 1875, for selling, as new milk, milk from which a portion of the cream had been removed, without making disclosure of the alteration.

After the milk in question had been purchased it was divided into three parts as required by s. 14 of the Act of 1875, and one part was handed to the appellant's man, the second was sent to the public analyst, and the third was retained by the respondent. At the hearing the appellant required the production of the third part, and the case states that when it was produced it appeared that the cork of the bottle in which it had been placed had been

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partly forced out of the bottle and part of the contents of the bottle had escaped. Then at the request of the appellant the bottle was sent to the Commissioners of Inland Revenue for its contents to be analysed, but in the circumstances a satisfactory examination of the milk was impossible, and the analysis could not be carried out.

The main point taken on behalf of the appellant is that it was a condition precedent to a conviction that the part of the article retained by the purchaser must be produced at the hearing in a condition capable of analysis, and that that part should in fact have been analysed at Somerset House, and that, those conditions not having been fulfilled, the conviction is bad. In support of that contention, reliance is placed on the case of *Hutchison* v. *Stevenson*. (1) In the case quoted it appeared that a bottle containing the third portion of the article purchased had burst some days before the hearing, and therefore could not be produced. The Court held that its production was a condition precedent to a conviction, and that seems clearly to follow from the language of s. 21 of the Act of 1875, which says that "the parts of the article retained by the person who purchased the article shall be produced." But in the present case the part retained was produced at the hearing, though it is true that it was not then in a state capable of analysis. In that case the Lord Justice-Clerk said: "The statute further enacts that if the accused so desires it he is entitled to have this third sample sent to Somerset House for analysis by the Government analyst there, so that his analysis may be produced in evidence at the trial. That in this case became impossible, because the third sample, which was retained by the purchaser, had ceased to exist before the trial." True; but in the present case the third sample had not ceased to exist. It is probable that the question as to what is to happen when the third sample is produced but is not then capable of analysis, which question had not to be decided in *Hutchison* v. *Stevenson* (1), was not present to the minds of the judges who decided that case, for although the Lord Justice-Clerk says that the accused is entitled to have the third sample sent to Somerset

(1) 4 F., J.C., 69.

House for analysis, I cannot find that the Act anywhere says that an analysis of the third sample by the Somerset House authorities is a condition precedent to a conviction. Sect. 21 of the Act of 1899 does say that the justices shall on the request of either party cause an article of food or drug to be sent to the Commissioners of Inland Revenue for analysis. I agree that that section, which renders obligatory on the justices what had previously under s. 22 of the Act of 1875 been merely discretionary, is intended to afford additional protection for the accused person, and it is argued for the appellant that, having regard to the provisions of s. 14 of the Act of 1875, the words "article of food" in s. 21 of the later Act can only refer to the third sample, which under s. 14 has to be retained by the purchaser. I do not agree with that; but, even if it were so, it does not follow that if when the third sample is produced it is in a condition which renders analysis impossible, that fact necessarily renders the whole proceeding nugatory. It would be a very strong thing to say that an accused person who has not challenged the accuracy of the analysis of the public analyst is to be acquitted merely because an inherent defect has rendered impossible the analysis of the third sample.

Counsel for the appellant also referred us to *Lowery* v. *Hallard* (1), but that case does not, in my opinion, touch the point with which we are dealing here. In that case the Court was dealing with the question as to the taking of samples, and all that was decided was that although the three samples need not be mathematically equal in size, yet each sample must be of a size sufficient to permit of analysis.

It does not appear quite satisfactorily from the case how it came about that the third sample deteriorated in the manner described, and I think that before this conviction can be upheld there ought to be a distinct finding of fact by the magistrate on this point, because s. 14 of the Act of 1875 provides that each sample shall be "sealed or fastened up in such manner as its nature will permit." If that was not done, I think that the conviction ought to be set aside, and the case must therefore go back

(1) Ante, p. 398.

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to the magistrate for him to find whether that provision of s. 14 has been complied with.

DARLING J. I am of the same opinion.

Case remitted.

Solicitors for appellant: *W. T. Ricketts & Son.*
Solicitor for respondent: *J. H. Hortin.*

F. O. R.

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March 8.

MADDEN, APPELLANT; RHODES AND OTHERS, RESPONDENTS.

Trade Union—Officer—Wilfully withholding Money of the Union—Absence of Fraud—Liability to Penalties—Trades Unions Act, 1871 (34 & 35 *Vict.* c. 31), *ss.* 9, 12.

If an officer of a trade union wilfully withholds money of the trade union, he is not, in the absence of fraud, liable to the penalties imposed by s. 12 of the Trades Unions Act, 1871, but under s. 9 of the Act an action may be brought against him for the recovery of the money.

Barrett v. *Markham*, (1872) L. R. 7 C. P. 405, applied.

CASE stated by a metropolitan magistrate.

A summons was issued under s. 12 of the Trades Unions Act, 1871 (1), by the appellant on behalf of the Amalgamated Society

(1) Trades Unions Act, 1871 (34 & 35 Vict. c. 31), s. 12: "If any officer, member, or other person being or representing himself to be a member of a trade union registered under this Act . . . . by false representation or imposition obtain possession of any moneys, securities, books, papers, or other effects of such trade union, or, having the same in his possession, wilfully withhold or fraudulently misapply the same, or wilfully apply any part of the same to purposes other than those expressed or directed in the rules of such trade union, or any part thereof, the Court of summary jurisdiction for the place in which the registered office of the trade union is situate, upon a complaint made by any person on behalf of such trade union . . . . may, by summary order, order such officer, member, or other person to deliver up all such moneys, securities, books, papers, or other effects to the trade union, or to repay the amount of money applied improperly, and to pay, if the Court think fit, a further sum of money not exceeding twenty pounds, together with costs not exceeding twenty shillings; and in default of such delivery of effects, or repayment of such amount of money, or payment of such penalty and costs aforesaid, the said Court may order the said person so convicted to be imprisoned, with or without hard

of Tailors and Tailoresses, a society registered as a trade union under the Act, against the respondents as trustees of the West End branch of the said trade union, complaining that they, being officers of the said trade union having in their possession certain moneys, securities, books, papers, and other effects of the Amalgamated Society of Tailors and Tailoresses, wilfully withheld the same.

Under the rules of the society a general committee of management, termed an executive council, was elected by a conference of delegates of branches which met periodically "to decide all questions of importance to the trade, to enact new rules, to amend existing ones and transact any business in the interests of the amalgamation, and to elect a general committee of management, termed an executive council." Each branch of the society was to appoint its own officers and conduct its own business in accordance with rules.

A dispute having arisen between the executive council and the West End branch in respect of the duties and appointment of an officer (not mentioned in the rules), referred to as the out-collector of the West End branch, the conference on August 10, 1904, resolved: "That it be an instruction from the conference that in future the out-collector of the West End branch must make members and take contributions for all branches of the West London district and such other branches as the executive council may direct, but no collector can be appointed without the consent of the executive council."

On April 28, 1905, the executive council, reciting the continued refusal of the West End branch to perform the duty imposed upon it by the above resolution, demanded "the resignation of the branch officers and committee, and the appointment of loyal members of our amalgamation," and further authorized the appellant, with another general trustee, to proceed to the West End branch and "to compel the trustees of that branch to deliver up all moneys, books, vouchers, documents, and all property of

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labour, for any time not exceeding three months: Provided that nothing herein contained shall prevent the said trade union . . . . from proceeding by indictment against the said party.

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whatever description held by them in trust for the Amalgamated Society of Tailors and Tailoresses."

The West End branch replied with the following unanimous resolution: "This meeting of members of the West End branch of the A. S. T., having considered the present situation in all its bearings, are satisfied that the branch officials have done nothing to justify the action of the executive council, and hereby demand the withdrawal of all adverse resolutions against the branch, and the acknowledgment of Mr. Willis's position as collector, failing which we authorize the officers and committee to withdraw the branch from the A. S. T., and pledge ourselves to support such action in any and every possible manner."

No fraud or dishonesty on the part of the respondents was proved or alleged, and the magistrate was of opinion that, having regard to the decision in *Barrett* v. *Markham* (1), the matter was therefore not within his jurisdiction, and he accordingly dismissed the summons.

The question for the Court was whether his decision was right.

Shearman, K.C., and *E. Browne*, for the appellant. The magistrate wrongly held that he was bound by *Barrett* v. *Markham* (1) to dismiss the summons in the absence of evidence of fraud or dishonesty. In *Barrett* v. *Markham* (1) the treasurer of a friendly society was charged under s. 24 of the Friendly Societies Act, 1855, with unlawfully withholding and misapplying certain moneys of the society. There was no charge of fraud against the defendant, and the Court held that a complaint under s. 24 would not lie, because s. 22 of the Act expressly provided an alternative remedy by way of civil proceedings for the recovery of money in the hands of an officer of the society. That decision has no application to the present case. Sect. 12 of the Trades Unions Act, though it contains the word "wilfully," is, it must be admitted, substantially in the same terms as s. 24 of the Friendly Societies Act, but the Trades Unions Act contains no provisions similar to those of s. 22 of the earlier Act. It is true that s. 9 enables the trustees or officers of trades unions to bring or defend any action concerning the property of the union, but,

(1) L. R. 7 C. P. 405.

having regard to s. 4, which prohibits legal proceedings instituted with the object of enforcing agreements between members, the claim of the appellant in the present case could not have been brought under s. 9, and therefore the procedure by way of a complaint before a Court of summary jurisdiction under s. 12 was the only remedy open to the appellant.

Herman Cohen, for the respondents, was not called upon to argue.

LORD ALVERSTONE C.J. In my opinion the decision of the magistrate was right. If the case of *Barrett* v. *Markham* (1) is to be taken to be an authority on the construction of s. 12 of the Trades Unions Act, 1871, it is distinctly in point; but apart from authority, looking at the latter words of s. 12 and the nature of the punishment to be inflicted, I should have thought that the section was clearly dealing with something more than a mere civil wrong. *Barrett* v. *Markham* (1) was decided under the Friendly Societies Act, 1855, and the decision proceeded upon two grounds—first, that s. 22 of the Act provided an alternative remedy by way of civil proceedings which was applicable to the circumstances of the case; secondly, that the language of the section in question, s. 24, clearly shewed that the section was only intended to apply to cases involving misconduct of a criminal character. Of course, if the language of the Trades Unions Act, 1871, were different from that of the Friendly Societies Act, then the case of *Barrett* v. *Markham* (1) would be no guide to us. It is admitted, however, that the language of s. 12 of the Act of 1871 is substantially the same as s. 24 of the earlier Act, but it is said that the Act of 1871 provides no alternative remedy corresponding to that contained in s. 22 of the Act of 1855. In my opinion, s. 9 of the Act of 1871 gives quite as full a civil remedy as s. 22 of the Act of 1855 does, and I am unable to agree with the contention that the effect of s. 4 of the Act of 1871 is to prevent s. 9 from being applicable to the circumstances of the present case. In my opinion the dispute in this case, which is one between the officials of a trade union and the

(1) L. R. 7 C. P. 405.

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trustees of a branch of the union relating to the property of the union, is one which is directly contemplated by s. 9.

For these reasons I am of opinion that this case comes within the principle of *Barrett* v. *Markham* (1), and the appeal must, therefore, be dismissed.

RIDLEY and DARLING JJ. concurred.

Appeal dismissed.

Solicitors for appellant: *Pattinson & Brewer.*

Solicitors for respondents: *Andrews & Andrews.*

F. O. R.

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Feb. 14.

TOZELAND *v.* GUARDIANS OF THE POOR OF THE WEST HAM UNION.

Poor Law—Guardians—Negligence of Servant—Liability of Guardians to Pauper Inmate in Action of Tort—Common Employment.

The defendants, a board of guardians of the poor, were carrying out an enlargement of the electric light installation at their workhouse by means of their own servants, the work being done under the supervision of their engineer, a permanent official of the workhouse. The plaintiff, a pauper inmate of the workhouse, was ordered by the labour-master to assist in the work, and was put to work on a staging some distance above the ground; while at work the staging, for the safety of which the engineer was responsible, gave way owing to its negligent and improper construction, and the plaintiff was injured. In an action against the guardians to recover damages for negligence:—

Held, first, that the defence of common employment afforded no answer to the action, for the plaintiff as a pauper inmate was compelled to obey the order to assist in the work and could not be held to have taken upon himself the risk of injury from the negligence of the defendants' servants; and, secondly, that the work was not being carried out by the defendants in the discharge of their administrative duties as guardians, and that therefore the action was maintainable.

Levingston v. *Lurgan Guardians*, (1868) I. R. 2 C. L. 202, and *Brennan* v. *Limerick Guardians*, (1878) 2 L. R. Ir. 42, considered.

APPEAL from a decision of the judge of the Bow County Court. The action was brought to recover damages for personal injuries

(1) L. R. 7 C. P. 405.

caused by the negligence of the defendants' servant. The facts were substantially as follows:—

The plaintiff, a man fifty-seven years old, who had been a cigar-box maker by trade, became an inmate of the union workhouse belonging to the defendants on July 19, 1904. In September, 1904, the installation of electric light in the workhouse was being altered and increased, the work being done under the orders and supervision of Mr. Baird, the engineer of the West Ham Infirmary, who was a permanent official of the workhouse; the work was not let to an independent contractor. On September 28 one Byers, the assistant electrician, applied to the labour-master for a man to assist him in the work, and the plaintiff was assigned to him for the purpose. In the course of the work the plaintiff, acting under the orders given to him, went with Byers upon a staging formed of a ladder and a pair of steps with a scaffold board between the two; the plaintiff was holding a leaden pipe against the wall and Byers was securing it by driving a hook into the wall, when the staging collapsed, and the plaintiff was thrown to the ground and received injuries which necessitated the amputation of his right leg. In the course of his evidence Byers said that if the plaintiff had thought the staging unsafe he could have appealed to his superior (Baird), and that if he (Byers) had told him to go on the staging and he had not gone he should have reported him. It was admitted by Baird that he was the person responsible for the safety of the staging. The learned judge found as a fact that the staging was an insecure platform upon which to put a man to work who had had no experience of such work, and that Baird, who had seen the plaintiff on the platform, was guilty of negligence; but he further held that the case could not be put more favourably for the plaintiff than as one of master and servant, that Baird and the plaintiff were fellow-servants of the defendants, and that therefore the plaintiff was precluded by the doctrine of common employment from recovering in a common law action of negligence; he gave judgment for the defendants without costs, and assessed the damages at 100*l.* in the event of the plaintiff being held entitled to recover. The plaintiff appealed.

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TOZELAND v. WEST HAM UNION.

R. Wallace, K.C. (*Abinger* and *Angus Campbell* with him), for the plaintiff. The doctrine of common employment is no defence to the present action. That doctrine does not depend on the mere relation of master and servant; the question is always whether the workman has voluntarily entered into a contract with his master by which he takes upon himself the risks of working with his fellow-workmen. The plaintiff did not voluntarily enter into a contract to do the work; on the contrary, he would have been liable to a penalty if he had refused to do it. The various Poor Law Acts relating to workhouses, of which 55 Geo. 3, c. 137, s. 5, 7 & 8 Vict. c. 101, s. 58, and 34 & 35 Vict. c. 108, s. 7, may be referred to, all affix a substantial penalty to a refusal by an inmate of a workhouse to do the prescribed work, the last-named section making the inmate so refusing liable to be punished as an idle and disorderly person under s. 3 of the Vagrancy Act, 1824, with imprisonment for a month. A pauper works under compulsion, and where there is compulsion to do the work the ordinary relation of master and servant does not exist, and the doctrine of common employment is inapplicable. On the point of compulsion *Smith* v. *Steele* (1), which was not cited before the county court judge, is entirely in point; there a pilot, whom the owner of a ship was compelled to employ, and who was compelled by statute to accept the employment, was held entitled to sue the shipowner for damages for injuries caused by the negligence of one of the shipowner's servants; in other words, the doctrine of common employment was no defence to the action. In all cases where the doctrine of common employment has been considered it has been based upon a contract, express or implied, by the servant with his master that he will take upon himself the risks of the employment; there is no ground for implying the existence of such a contract in the present case. [He also cited *Priestley* v. *Fowler* (2); *Wilson* v. *Merry*. (3)]

Avory, K.C. (*Stephen Lynch* with him), for the defendants. It is difficult to define the exact legal relation of a pauper inmate of a workhouse to the guardians, but the most favourable view

(1) (1875) L. R. 10 Q. B. 125. (2) (1837) 3 M. & W. 1.
(3) (1868) L. R 1 H. L. Sc. 326.

for the former is that the relation of master and servant exists between them. If the plaintiff was not the servant of the defendants he was a mere volunteer in doing the work; but a volunteer cannot impose upon the master a greater liability than that in which he stands towards his own servants, and the action would not be maintainable: *Potter* v. *Faulkner*. (1)

[LORD ALVERSTONE C.J. I do not think that the distinction drawn between servant and volunteer is exhaustive.]

He might possibly be a licensee, but as such he would not be in a better position than a servant or volunteer. If it is once admitted that the plaintiff was the servant of the defendants, the action is not maintainable, for he comes within the application of the doctrine of common employment. The case of *Smith* v. *Steele* (2) is distinguishable, the ground of that decision being that the pilot had no choice as to entering the service of the shipowner, but was compelled by statute to do so.

[LORD ALVERSTONE C.J. Do you suggest that the plaintiff was not compelled to go into the workhouse?]

Yes; it is contended that he voluntarily entered into the employment of the guardians by entering the workhouse; he thereby impliedly contracted to give his labour in return for board and lodging. The fact that a pauper inmate of a workhouse is ordered to do a particular kind of work is no answer to the defence of common employment; we must look at the time when he entered into the employment of the guardians, and if that is a voluntary act on his part he takes upon himself the risk of negligence on the part of his fellow-servants.

Apart from the doctrine of common employment, it would be imposing a very heavy liability upon a public body, such as guardians of the poor, if they were held to be liable to a pauper inmate for the negligence of a servant in carrying out the duties of administration. Upon this point *Brennan* v. *Limerick Guardians* (3) is a strong authority, and deals with the principle upon which actions of tort are in certain cases maintainable against boards of guardians. [He also referred to *Levingston* v. *Lurgan Guardians*. (4)]

(1) (1861) 1 B. & S. 800.
(2) (1875) L. R. 10 Q. B. 125.
(3) 2 L. R. Ir. 42.
(4) I. R. 2 C. L. 202.

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R. Wallace, K.C., in reply. A man may be the servant of another, and yet not be a servant in common employment at all. The question is not simply whether he is in the same employment with the person whose negligence caused the accident, but what was the contract between himself and his employer. In *Smith* v. *Steele* (1) it was not disputed that the pilot was in the employment of the shipowner; the question was whether he had contracted to run the risks of the employment.

[He was stopped on this point.]

As to the position of the guardians, it is submitted that the action is maintainable. In *Brennan* v. *Limerick Guardians* (2), upon which the defendants rely, the decision proceeded entirely upon the ground that for acts done by them as administrators under the poor law guardians are not liable. But this was not a mere act of administration: the work of extending an electric light installation cannot come under that head; it was very substantial work upon the building itself, which might well have been given to a contractor to perform, but which the defendants preferred to do themselves; and there is no valid reason why they should not be liable for negligence in carrying out work of that description. The class of work was similar to that in *Levingston* v. *Lurgan Guardians* (3), where guardians were held to be liable for the negligent acts of their officials in the construction and user of a sewer. [He also cited *Southampton and Itchen Bridge Co.* v. *Southampton Local Board.* (4)]

LORD ALVERSTONE C.J. Upon the main question upon which the learned judge decided this case I have felt no doubt. His view, which is crisply and clearly put, is that the case should be decided upon the assumption that the plaintiff was a servant of the defendants, giving his services in return for board and lodging; and that in the circumstances of the case the defence of common employment afforded an answer to the action. With great respect for the opinion of the learned judge, I am unable to take that view, which seems to overlook the broad consideration lying at the root of the doctrine of common employment,

(1) L. R. 10 Q. B. 125.
(2) 2 L. R. Ir. 42.
(3) I. R. 2 C. L. 202.
(4) (1858) 8 E. & B. 801.

that the servant has the option of entering, or refusing to enter, into a contract of employment. It was conceded during the argument that the plaintiff was doing labour which he was compelled to do under the Poor Law Acts affecting the management of workhouses, and that a refusal on his part would or might have entailed penalties; it is only necessary to refer to 55 Geo. 3, c. 137, s. 5, 7 & 8 Vict. c. 101, s. 58, and 34 & 35 Vict. c. 108, s. 7, all which provide for penalties or punishments for refusal to do the prescribed work. We ought not to hesitate to apply the doctrine of common employment, if that defence has not been taken away by statutory enactment and if the facts justify it, but it is essential to see the basis upon which that doctrine rests. That may be collected from a series of cases, to which I need only refer very shortly, in which the doctrine has been discussed. In *Priestley* v. *Fowler* (1) Lord Abinger C.B., in delivering the judgment of the Court, said: "The servant is not bound to risk his safety in the service of his master, and may, if he thinks fit, decline any service in which he reasonably apprehends injury to himself; and in most of the cases in which danger may be incurred, if not in all, he is just as likely to be acquainted with the probability and extent of it as the master."

In *Hutchinson* v. *York, Newcastle and Berwick Ry. Co.* (2) Alderson B. laid down the principle thus: "The principle is, that a servant, when he engages to serve a master, undertakes, as between him and his master, to run all the ordinary risks of the service, and this includes the risk of negligence on the part of a fellow-servant, whenever he is acting in discharge of his duty as servant of him who is the common master of both." Lord Cairns, in *Wilson* v. *Merry* (3), puts it thus: "At all events, a servant may choose for himself between serving a master who does, and a master who does not, attend in person to his business. But what the master is, in my opinion, bound to his servant to do, in the event of his not personally superintending and directing the work, is to select proper and competent persons to do so, and to furnish them with adequate materials and resources for the work. When he has done this

(1) 3 M. & W. 1, at p. 6. (2) (1850) 5 Exch. 343, at p. 352.
(3) L. R. 1 H. L. Sc. 326, at p. 332.

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he has, in my opinion, done all that he is bound to do." In all these leading cases, therefore, the doctrine of common employment is based upon the consent of the servant to enter into the particular employment. The doctrine might, I think, apply to the case of a servant who consented to enter an employment which involved work of a miscellaneous character. But there must be something in the nature of a voluntary bargain on the part of the servant to run the risks of the employment, and not merely the doing of work by compulsion of law. *Smith* v. *Steele* (1) is a more recent illustration of the principle: it is not an authority in the present case, for it must not be forgotten that in that case the particular workman, a pilot, was bound under severe penalties to go and perform the particular service; it was not a case of what I may call a general, but of a particular, compulsion.

The defendants' counsel met the difficulty by contending that the plaintiff need not have gone into the workhouse, and that he went in on the terms that he would give his labour in return for his sustenance. But I cannot agree with his contention that the language of the Act of Parliament shews that to be the basis of the relations between a pauper and the guardians. When a pauper goes into the workhouse he does not know what work he may be called upon to perform, and it seems to me an unjustifiable extension of the doctrine of common employment to say that for a man to go in a starving condition into the workhouse is equivalent to a contract on his part to do any work that he may be ordered to do as though he were a servant who could refuse to do it. The option or choice which the servant has to exercise must be an option or choice with reference to the work, and I cannot think that we are at liberty to disregard the compulsion of hunger, which drives a man into the workhouse, and to say that under such circumstances a man goes into it voluntarily in the sense in which a servant voluntarily enters an employment.

But the other question which was argued before us, that of the liability of poor law guardians for the negligence of their subordinate officers, presents, to my mind, a more serious

(1) L. R. 10 Q. B. 125.

difficulty, which has not been wholly removed during the arguments; the balance, however, of the reasoning leads me to the conclusion that the guardians are responsible. It is difficult in such cases to apply to public bodies who act by agents the ordinary rule of law as to the liability of a principal for the acts or omissions of an agent. From the decisions it seems that in some cases that rule ought to be applied, in others that it ought not; and the difficulty here is to decide whether the facts bring the case within the rule or not. Of the cases in which the rule ought to be applied, *Levingston* v. *Lurgan Guardians* (1) and *Southampton and Itchen Bridge Co.* v. *Southampton Local Board* (2) afford good illustrations. In general terms, the result of them is that, if a public body is doing by their agents a work connected with their ordinary ministerial or administrative duties, that body will be liable for injury resulting from the commission of a negligent act on the part of a subordinate. On the other hand, there are cases, of which *Brennan* v. *Limerick Guardians* (3) is an example, where it has been held that, if the injury arises from the negligence or omission of a subordinate to comply with his instructions, he being a proper person for the post which he was appointed to fill, no action will lie against a public body such as a board of guardians. If in the present case there had been merely a breach by the labour-master of his duties as labour-master, or a breach of the instructions given by him, I should have felt great doubt whether the defendants were liable. The difficulty is to decide within which of the two classes of cases to which I have referred the present case falls, and that decision can only be arrived at upon a consideration of the particular facts of the case. Shortly put, the facts are that the defendants decided to extend the electric light installation at the workhouse; they did not engage a contractor for the work, but did it themselves by their own servants, who in the course of the work erected this platform. By direction of the labour-master the plaintiff was told to go and assist in the work, part of which consisted in holding up pipes against the wall while standing on the platform; there was no improper act of the

(1) I. R. 2 C. L. 202. (2) 8 E. & B. 801.
(3) 2 L. R. Ir. 42.

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labour-master in giving the direction, for he was merely finding work for the plaintiff as a pauper. The accident arose from the negligence of another employee who had improperly constructed the platform, or had allowed it to be improperly constructed, so that it was negligent in the ordinary sense of the word to allow the plaintiff to go upon it. These facts bring the case, in my opinion, within the class of case in which the guardians, having work to do as guardians, do it under circumstances in which a person to whom they owe a duty would have a right of action against them if injured through the negligence of a servant acting on their behalf. I have therefore come, though with considerable hesitation, to the conclusion that this action can be maintained.

I only desire to add, with regard to the argument on behalf of the defendants, that I must not be supposed to agree with the view that the distinction drawn between a servant and a volunteer is an exhaustive distinction. I think there may be cases of servants who would be entitled to recover in such an action, notwithstanding that others might be prevented from recovering by the operation of the doctrine of common employment, and similarly that some volunteers might maintain an action, although other volunteers would be debarred from recovering on the ground that they had merely interfered in the performance of a particular piece of work, in which they had no interest and over which they had no control.

For the reasons I have given, I am of opinion that this appeal must be allowed and judgment entered for the plaintiff for 100*l.*, the amount at which the damages were provisionally assessed by the learned county court judge.

RIDLEY J. I agree on both points with the judgment of my Lord. I do not think that the doctrine of common employment affords a defence to the action. The case is one in which the plaintiff was necessarily subject to the orders which might be given to him by the defendants' servants, and it was in doing work which he was ordered to do, and could not refuse to do, that he met with the accident. In the judgment in *Priestley* v. *Fowler* (1) there are phrases used, which have been already cited

(1) 3 M. & W. 1.

by my Lord, and which seem to place great stress on the question whether the risk of the employment has been undertaken by the servant of his own free will; and the root of the principle underlying the doctrine of common employment is plainly shewn to be that the servant has taken upon himself the risk of the negligence of his fellow-servants in the course of their employment. The same principle is also clearly laid down in the passage cited by my Lord from the judgment in *Hutchinson* v. *York, Newcastle and Berwick Ry. Co.* (1), which shews that the Court was there dealing with a case where the servant had the option of refusing to enter the employment or of undertaking the particular work, and where, knowing the risks as well as his master knew them, he deliberately decided to run these risks. If we want an instance of a case where the facts are all the other way, we need look no farther than the present one, that of the workhouse pauper, who has no option of doing or refusing to do the work ordered; it is not open to him to say that he knows the risks of the employment and declines to take them upon himself. That being so, it seems to me that the argument on which so much reliance has been placed, namely the doctrine of common employment, furnishes no defence to this action. Then it was contended that the plaintiff was only a volunteer, and in one sense that is true: he was a volunteer in so far as he got into the workhouse by his own voluntary act, but he was not a volunteer as to the work which he should do as an inmate, and the application of the doctrine of common employment must depend upon his voluntary consent to do that work; the doctrine cannot apply merely because at an antecedent period he voluntarily entered the workhouse.

It was further contended substantially that the action was against public policy, and that such an action was not maintainable against poor law guardians. No doubt there are limits to the liability of public officers in actions of tort; but the general rule, as applied in *Southampton and Itchen Bridge Co.* v. *Southampton Local Board* (2), is that they may be liable for negligence. The case of *Brennan* v. *Limerick Guardians* (3), where the alleged

(1) 5 Exch. 343, at p. 352.
(2) 8 E. & B. 801.
(3) 2 L. R. Ir. 42.

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negligence was in not providing proper attendance on a patient in a fever hospital, is not binding on us, and is clearly not on all fours with the present case; nor do I agree with the contention that the principle of that decision should be extended. The present case is more akin to *Levingston* v. *Lurgan Guardians* (1), in which an action was held to be maintainable against guardians for making a sewer and discharging sewage from the workhouse into a stream to the use of which the plaintiff was entitled. I can see no reason of public policy why guardians should not be liable in an action of negligence, but I think that good reasons may be found why they should be.

DARLING J. I am of the same opinion. Dealing first with the question whether guardians of the poor can be made liable in an action of negligence, I must confess that it seems to me one of very considerable difficulty; that difficulty I feel equally with my Lord, and I have come to the same conclusion at which he has arrived. I think that the rule of law is to be ascertained from the judgment in *Levingston* v. *Lurgan Guardians* (2), where Whiteside C.J. says: "Upon the ultimate decisions in these two cases, *Mersey Docks Trustees* v. *Gibbs* (3) and *Coe* v. *Wise* (4), it must, I think, be now taken as established—first, that unless the provisions of the Legislature, by express enactment or necessary implication, otherwise determine, an action for such a wrong as that which is the subject of the present suit lies against a corporation, or public trustees acting gratuitously for public purposes; secondly, that they are not exempted by the Legislature from this liability because the legislative provisions which regulate them do not provide funds out of which the damages recovered in an action against them can be paid." It is true that in that case the injury to the plaintiff had been caused by the making of a sewer by the guardians, and that there is of course, upon the facts, a broad distinction between that case and the present.

Then came the case of *Brennan* v. *Limerick Guardians* (5), in

(1) I. R. 2 C. L. 202.
(2) I. R. 2 C. L. 202, at p. 219.
(3) (1866) L. R. 1 H. L. 93.
(4) (1866) L. R. 1 Q. B. 711.
(5) 2 L. R. Ir. 42.

which the judgment of the Court was delivered by Fitzgerald J., who says (1): "The reasons I have expressed are sufficient to sustain our judgment, and are concurred in by my brethren; but I desire further to state my own impression that on other and wider grounds the action is not maintainable." Apparently, therefore, the grounds which the learned judge goes on to mention did not altogether commend themselves to the other members of the Court, and it is these grounds (and it is this which I particularly wish to point out) which form the strongest part of the argument against the plaintiff in the present case. The learned judge proceeds thus: "If the present action can be maintained, why should not an action lie against the guardians at suit of each pauper for every supposed neglect of administrative duty causing to the individual any real or fancied grievance?—for example, for supplying food insufficient in quantity, or inferior in quality, or insufficient or inferior clothing or bedding, defective sanitary arrangements, or any other of the various neglects or omissions by which inmates of a workhouse may be prejudicially affected. If the real or supposed omissions of guardians are to be thus redressed, it would be difficult, if not impracticable, to administer the laws for relief of the destitute poor." It is to be noticed at this point that all the instances which are put by Fitzgerald J. are strictly confined to cases of omission to perform certain statutory duties. In the earlier part of the judgment, with which the other members of the Court agreed, he says: "We are of opinion that the plaint is bad in substance, in not stating any duty which the statute law imposed on the defendants; and on the contrary alleging a duty which the law did not impose on them, and resting the supposed right of action on a breach of that duty." And further on he says: "Their duty was to take order for the relief of the poor according to the orders, general or special, of the Poor Law Commissioners. . . . . The action might as properly be brought against the Commissioners as against the guardians." Looking at the present case, can anybody say that this action might as properly be brought against the modern equivalent of the Commissioners, that is, against the Local Government Board,

(1) 2 L. R. Ir. 42, at p. 48.

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Darling J.

as against the guardians? It seems impossible to me to so contend. The complaint here is not that the doing of an act imposed upon the defendants by statute or by the Local Government Board led to the plaintiff's injury. The defendants were extending the existing installation of electric light in the workhouse; they were at liberty to employ a contractor for that purpose, but they preferred to use the inmates to do it. I do not suggest that there was anything improper in their doing so; on the contrary, I think it was a reasonable course to take. They had the power to order the inmates to perform certain kinds of labour which they (the guardians) might select, and they ordered the plaintiff to assist a person who was putting in this electric light installation; in the doing of the work that other person did something which the learned judge finds to have been negligent, the direct result of which was the injury to the plaintiff. In my opinion, this case is quite distinguishable from *Brennan* v. *Limerick Guardians* (1), and has a much greater resemblance to *Levingston* v. *Lurgan Guardians* (2), in which the action was held to be maintainable. With considerable hesitation, therefore, I think that this action will lie against the guardians.

Then comes the point upon which the learned county court judge decided this case in favour of the defendants. He held that the plaintiff must be regarded as a fellow-workman of the man who was negligent, and that, therefore, the doctrine of common employment applied to prevent his maintaining this action. I do not think that this was the correct view, for a reason which is, I think, somewhat different from that given by the other members of this Court, and which, at any rate, I would prefer to express in my own language. In my opinion the doctrine of common employment is based upon the existence of a contract between the servant and the employer; if the servant is in a position to choose whether he will or will not run the risk, then (and this is the foundation of the argument) the doctrine volenti non fit injuria applies. But a pauper is not in a position to choose whether he will run the risk, or to choose what sort of labour the guardians shall put him to. At the most, when he is ordered to do some particular task, he can say

(1) 2 L. R. Ir. 42

(2) I. R. 2 C. L. 202.

"My poverty, but not my will, consents." In that way, therefore, I think that the doctrine volenti non fit injuria cannot apply to the case of a pauper employed upon a workhouse task, and the very foundation of the doctrine of common employment fails; there is no common employment, for there is no contract with the guardians at all.

If that is so, there is only one way in which the defendants can hope to escape from the position, and that was taken by their counsel when he put forward the argument that the plaintiff had entered the workhouse willingly. That really amounts almost to setting up the doctrine of the "contrat social" of Rousseau, that all the rights, all the obligations, and all the disabilities of all the inhabitants of the world were regulated by an implied contract to which everyone was a party. If that theory could be supported, no doubt there would be a contract between the plaintiff and the guardians and between the plaintiff and his fellow-paupers and the guardians. But that doctrine has for long been discredited, and I think that in the absence of an actual contract, express or necessarily implied, between the pauper and the guardians the doctrine of common employment has no application to the present case, and that there must be judgment for the defendants.

Appeal allowed. Leave to appeal.

Solicitors for plaintiff: *Philbrick & Co., for Haynes, Robinson & Co., Bow.*

Solicitors for defendants: *Hillearys.*

W. J. B.

C. A.
1906
Feb. 22, 23.
March 24.

[IN THE COURT OF APPEAL.]

THE KING *v.* LLOYD.

County Court—Deputy Judge—Appointment of Two Deputies to act respectively for different Courts—Validity of Appointment—County Courts Act, 1888 (51 & 52 *Vict. c.* 43), *s.* 18.

A county court judge may, under s. 18 of the County Courts Act, 1888, lawfully appoint a deputy to act for him in one of the district courts of which he is judge.

So *held* by Vaughan Williams L.J., Stirling L.J., and Fletcher Moulton L.J., the last-mentioned Lord Justice doubting.

Appeals from orders of a Divisional Court as after mentioned.

A defendant against whom judgment had been given in a county court action, which had been tried by a deputy county court judge in the Brompton County Court, obtained a rule nisi for a certiorari to bring up the proceedings in the action, and a rule nisi for a prohibition, on the ground that the appointment of the deputy county court judge was invalid.

The facts are fully stated in the report of the case in the Court below. (1) The following short statement of them is taken from the written judgment of Vaughan Williams L.J. :—

"His Honour Henry James Stonor, judge of the Marylebone County Court, being ill, made on February 13, 1905, an order appointing F. B. Fitzroy Cowper, Esq., barrister-at-law, to act as his deputy for the said Marylebone Court in his absence, from the 13th day of February until the 13th day of April next, and, failing the said F. B. Fitzroy Cowper from illness or other cause on any day or days during the said period, further appointed Clement Elphinstone Lloyd to act as his deputy during his absence for the said Court on such day or days aforesaid. Judge Stonor, who was also judge of the Brompton County Court, on the same day made an order in similar terms appointing Clement Elphinstone Lloyd to act as his deputy in the said Brompton County Court, and, failing him, appointing Mr. Fitzroy Cowper. The periods of appointment were the same in the two orders. The two barristers thus appointed respectively sat as deputies,

(1) Ante, p. 22.

the former in the Marylebone County Court, the latter in the Brompton County Court, and sat on the same day."

Upon argument the Divisional Court (Lord Alverstone C.J., Wills J. and Darling J.) discharged the rules.

Duke, *K.C.*, and *W. O. Hodges*, for the appellant, the defendant in the county court action. The general rule is that, where the holder of an office has power to appoint a deputy, he cannot divide his office by appointing more than one deputy to act at the same time, or a deputy to exercise only part of his office: see *Parker* v. *Kett* (1); *Denny* v. *Trapnell*. (2) The power to appoint a deputy in this case depends on the County Courts Act, 1888, s. 18, and, presumably, that enactment ought to be construed in accordance with the general rule on the subject. The Court created by the County Court Acts, as a modern equivalent for the old county court, or sheriff's court, is one court, having one entire jurisdiction, though for convenience that jurisdiction is divided into branches, and has to be exercised locally with reference to the several local areas or districts into which the judge's entire district may be divided. It is a fallacy to treat the judge as holding separate offices, and having a separate jurisdiction, in respect of each of the districts of which his circuit consists. Sect. 18 of the Act by its terms manifestly contemplates the appointment of one deputy, who is to exercise, during the time for which he is appointed, the entire jurisdiction of the county court judge, and not the appointment of a deputy for one or some only of the district courts contained in the judge's circuit. The county court judge is not judge of the Marylebone County Court and also judge of the Brompton County Court; he is the judge of the Middlesex County Court, holden at Marylebone and at Brompton, which is one office. Sect. 21 of the County Courts Act, 1888, points strongly to the conclusion that the Legislature only contemplated the appointment of one deputy to exercise the whole of the county court judge's jurisdiction; for how could two deputies each receive "a rateable proportion of the salary and travelling allowances attached to the office so vacant," as provided by that section?

(1) (1701) 12 Mod. 467. (2) (1768) 2 Wils. 378.

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S. A. T. Rowlatt, for the deputy county court judge. The word "district" is no doubt used in some sections of the County Courts Act, 1888, as meaning the whole circuit of the judge, and in others as referring to the local districts constituting that circuit; but it is submitted that, looking at the scheme of the County Court Acts as a whole, as it is to be gathered from the various sections, the effect is that the jurisdiction of the judge in respect of each of the local districts of which his circuit is composed is a separate jurisdiction, and the judge's office in respect of each is a separate office. If that be so, there is no reason why he should not, under s. 18 of the Act, appoint a deputy for one of his districts only or different deputies concurrently in respect of different courts. Each of his courts has a separate area of jurisdiction and has its own registrar and officers and separate machinery. Sect. 18 of the County Courts Act, 1888, must be read with reference to the general scheme of the Act; and, if it be held that the judge has a separate jurisdiction in respect of each of his court districts, then its phraseology, and the fact that it only refers to "deputy" in the singular, will put no difficulty in the way of the conclusion that the appointment of the deputy in this case was valid. The latter part of s. 21 does no doubt create some difficulty, because the language there used does rather seem to shew that the Legislature were contemplating the existence of one deputy only, when dealing with the remuneration to be paid to a deputy after the death of the county court judge who appointed him, but there would really be no great difficulty under the provisions of the section in making a proper apportionment of the salary; and the earlier words of the same section strongly point to the conclusion that there may be an appointment of a deputy by a county court judge for some of his courts only.

I. A. Symmons, for the plaintiff in the county court action. The case of *Reg.* v. *Parham* (1) is an authority that the county court judge holds separate offices in respect of his different court districts. The defendant applied for an adjournment of the trial in the county court for his own convenience, and he made no objection on the score of want of jurisdiction, but took his chance of a judgment at the trial. He cannot, therefore, now take

(1) (1849) 13 Q. B. 858.

objection to the jurisdiction. Where the want of jurisdiction does not appear on the face of the proceedings, the granting of a prohibition is discretionary. He cited *Farquharson* v. *Morgan* (1); *Mayor of London* v. *Cox* (2); *Broad* v. *Perkins* (3); *Rex.* v. *Tristram.* (4)

Cur. adv. vult.

March 24. VAUGHAN WILLIAMS L.J. read the following judgment:—In my judgment this appeal must be dismissed, and the judgment of the King's Bench Division affirmed on the grounds given by the Court. Lord Alverstone says (5): "I therefore come to the conclusion that, there being the power to appoint a deputy, and there being jurisdiction in each of these courts, and in the district of each of these courts, it is not contrary to the statute, or contrary to any rule of law, that the appointment of a deputy should be made for the district of a court"; and he goes on to say: "Therefore I think that these appointments made by the county court judge, and sanctioned by the Lord Chancellor, are within the powers of the Act of Parliament, and that both these rules should be discharged." The rules in question were rules to shew cause respectively why a writ of prohibition and a writ of certiorari should not issue. The case arose in this way. [The Lord Justice here stated the facts as above.] The unsuccessful defendant in the cause of *Solman* v. *Day*, tried before Mr. Lloyd, has raised the question as to the jurisdiction of Mr. Lloyd sitting as the deputy of his Honour Judge Stonor.

When the rules were first granted they were granted upon the ground that a county court judge has no power to appoint more than one deputy to sit for him on the same day, even though the deputies are appointed to sit in different district courts. But in the argument before us, and in the argument in the King's Bench Division, Mr. Duke did not argue his case upon the ground of the inability of the county court judge to appoint two deputies to act for him in different district courts on the same day, but argued it on the ground that a county court judge

(1) [1894] 1 Q. B. 552.
(2) (1867) L. R. 2 H. L. 239.
(3) (1888) 21 Q. B. D. 533.
(4) [1902] 1 K. B. 816.
(5) Cited from shorthand note of judgment.

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could only appoint a deputy to exercise the whole of his jurisdiction as county court judge in all the courts within the county of which he had been appointed judge; or, to put it in other words, he argued that a county court judge could not appoint a deputy to sit for him at one of the courts within his circuit, as it is called, but, if he appointed a deputy at all, must appoint him as his deputy to sit at all the courts within his circuit, and to exercise the whole of his jurisdiction.

Now, in my opinion, there can be no doubt but that the court of each district to which a county court judge is appointed is a separate court, with separate jurisdiction, separate officers, and separate procedure, and the question we have to decide is whether a county court judge of the county of Middlesex can for proper cause appoint a deputy to act for him in one of the district courts of which he has been appointed the judge.

Now the power of appointment is given by s. 18. That section provides, first, that, in case of illness or unavoidable absence of any judge, it shall be lawful for such judge to appoint a barrister to act as his deputy during such illness or unavoidable absence, provided (*a*) that the fact of appointment and name of the deputy shall be forthwith communicated to the Lord Chancellor; (*b*) that no deputy so appointed shall be entitled to act for more than fourteen days unless with the approval of the Lord Chancellor. Thus far I see nothing in the words of this section to suggest that the power to appoint a deputy is confined to the appointment of a deputy to exercise the jurisdiction of a county court judge as distinguished from the jurisdiction of a county court judge as the judge of a district. On the contrary, I think that the words "unavoidable absence" point to the absence of the judge from the district court. Secondly, it is provided that it shall also be lawful for any judge, with the approval of the Lord Chancellor, to appoint a barrister as his deputy for any time or times not exceeding in the whole two months in any consecutive period of twelve months; and that every deputy appointed under this section during the time for which he shall be so appointed shall have all the powers and privileges and perform all the duties of the judge for whom he shall have been so appointed.

Now the appointment of these deputies by Judge Stonor undoubtedly was an appointment under the last-mentioned part of s. 18—that is to say, an appointment for two months; and it is said that, as under this appointment the deputy is to "have all the powers and privileges and perform all the duties of the judge for whom he shall have been so appointed," this appointment necessarily is an appointment by a county court judge to perform all his duties as a county court judge within all the districts in which he has been appointed to act, or which he may by s. 9 of the Act or any other section be empowered to exercise outside the districts in which he has been directed to act as county court judge. It will be observed, however, that these latter words of the section apply to every appointment of a deputy, whether the appointment be under the first words of the section or under the later words. Sect. 21, so far as the words "and he" (i.e., the deputy) "shall continue to act in all the Courts to which he was appointed," are concerned, points to s. 18 empowering the appointment of a deputy for each district court, but the words of this section which provide that any such deputy shall receive, after the death or resignation of the judge, a rateable proportion of the salary attached to the office point certainly the other way. But in my opinion it is plain, taking all the sections of the Act of Parliament into consideration, that it is a possible construction of s. 18 to hold that it authorizes the appointment by a county court judge of a deputy to act for him in one of his district courts, and, inasmuch as to hold otherwise would cause great practical inconvenience, and county court judges have, we have ascertained, for the last twenty-five years, and probably ever since the passing of the Act of 1846, appointed deputies, with the approval of the successive Lord Chancellors, for the performance of the duties of the county court judge at one of his courts or in one of his districts, I think we ought to put that construction on the Act of Parliament. The result is that these appeals will be dismissed with costs.

STIRLING L.J. I entirely agree.

FLETCHER MOULTON L.J. The delegation of judicial powers is such an exceptional privilege and a matter of such importance,

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that the conditions under which it is permitted should be laid down by the Legislature so as to admit of no doubt. This is especially so in the case of the county court judges, who administer the justice which, on account of its local character and comparative cheapness, is the only form which in civil matters is accessible to the great bulk of His Majesty's subjects; and, although I am not prepared to dissent from the decision of my brother Lords Justices, I think that I ought to state the conclusion at which I should have arrived, if this matter had been res integra, in order that the advisability of rendering more explicit and definite the conditions under which a county court judge can delegate his powers may be brought before those in whose power it lies to frame further legislation on the subject.

By the county court system, as it exists in England and Wales, the country is divided into separate county court districts, each of which constitutes a separate area of jurisdiction, and has its complete judicial equipment, courts, offices, officers, and such like, all separate and peculiar to itself, with the exception of the judge. As regards the judge, it is well known that the practice is for the Lord Chancellor to group two or more of these districts together for the purpose of placing them under the jurisdiction of a particular judge. This is done under the powers of s. 13 of the Act of 1888. In the case of such a grouping, the only nexus, if I may use the expression, between the otherwise independent units of jurisdiction so grouped is the personality of the judge himself; and, when he dies, or resigns, or from the amount of work or for other reasons it becomes necessary, the Lord Chancellor has full power to alter the grouping.

Such being the nature of the county court system, I now come to the section of the statute which permits delegation of his powers by the judge. The power to delegate judicial functions is not the rule, but the exception. A judge of the High Court cannot delegate his functions. The county courts, however, have to deal with very numerous matters, mostly of a local character, and involving small sums, and accordingly it appears to have been thought that the evils of delay in

disposing of such matters would be so great that liberal powers of delegation should be given in order to prevent any interruption of continuity in the administration of justice in such courts. The section in the County Courts Act, 1888, dealing with the delegation of the functions of a county court judge is s. 18. That section provides for two cases. One is where, in the case of his illness or unavoidable absence, the county court judge requires to appoint a substitute "during such illness or unavoidable absence." That seems to contemplate absences of a short and casual character. The other case is where the judge has occasion to appoint a deputy for a definite period, which he may do for not exceeding in the whole two months in any consecutive period of twelve months. In the first case the judge is left to choose his deputy, but must communicate the appointment to the Lord Chancellor; in the second case the appointment can only be made with the approval of the Lord Chancellor. In both cases the section appears to speak of the deputy appointed as the deputy of the judge generally. There are no words pointing to any division of the judge's functions or office. The section gives the judge power in the first case to "appoint a barrister of at least seven years' standing to act 'as his deputy' during such illness or unavoidable absence," and in the second case to "appoint a barrister of at least seven years' standing to act 'as his deputy' for any time or times not exceeding in the whole two months in any consecutive period of twelve months."

Reading the section so far, and without reference to the last clause of it, I should, if the matter were res integra, have been disposed to come to the conclusion that the section only gave power to the judge to create a substitute who should for the time being stand in altogether the same position as the judge himself; but, when I come to the last clause of the section, I find it somewhat difficult to see how any other construction can be admissible, for it provides that "every deputy appointed under this section, during the time for which he shall be so appointed, shall have all the powers and privileges and perform all the duties of the judge for whom he shall have been so appointed." If this matter had been res integra, I cannot but believe that the Court must have taken the view that the deputy

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appointed under s. 18 stepped into the entire position of the judge for whom he was deputy, and assumed the whole of his functions and powers.

Sects. 19 and 20 of the Act also relate to the matter of delegation of his functions by a county court judge, and appear to carry out the same scheme in relation thereto, for they both seem to me to treat the deputy as being in the same position as the judge, but they are perhaps not very important, as they carry the matter no further than does s. 18. I now come to s. 21, a section on which, curiously enough, both parties strongly rely in support of their respective contentions. That section relates to the position of a deputy after the death or resignation of the judge who appointed him. Naturally, upon either of those events, the delegation would come to an end; but for the same reason that the power of delegation is given, namely, that there may be no interruption of continuity in the administration of local justice, it is provided by s. 21 that the deputy shall continue to exercise the powers delegated to him until the Lord Chancellor shall otherwise order or until the appointment of a new judge. But, as the judge is dead or has resigned, and is therefore no longer receiving any remuneration, the deputy who is now employed, not by the judge, but by the country, has to be remunerated by the country for his services, and it is accordingly provided that he "shall receive as remuneration for the period that he may act as deputy, after the death or resignation of the judge, a rateable proportion of the salary and travelling allowances attached to the office so vacant during any vacancy." Now, a "rateable proportion" means a sum which may be determined by a simple rule-of-three sum—that is to say, if the yearly salary of the judge was so much, and the deputy judge acted, say, for a quarter of a year, his remuneration under the section would be a quarter of the judge's yearly salary. That carries out the idea that the deputy is intended to step into the entire position of the judge under s. 18, and seems to be inconsistent with any other interpretation of that section. The respondents, however, find words in this section upon which they rely in support of their contention. The section says that the deputy "shall continue to act in all the courts to which he was

appointed" until the Lord Chancellor shall otherwise order, or a successor to the county court judge shall be appointed. It is argued that these words shew that the deputy might be appointed to some only of the courts of which the county court judge's circuit was composed. It appears to me that these words are consistent with the contention of the respondents, but are equally consistent with that of the appellant. As I have said, the several county court districts are linked together by the nexus of the judge's personality, through being grouped for the sake of convenience in what I may call the circuit of a particular judge. I think that the words in question may receive their full interpretation if they are read as providing that the grouping of the districts shall continue in spite of the nexus between them, the judge himself, being removed, until the Lord Chancellor thinks fit to order otherwise or a successor to the judge shall be appointed, and that the words "the courts to which he was appointed" really mean the courts in that combination of districts which had been presided over by the judge whose place he took.

I see, therefore, no difficulty, so far as the words of the statute are concerned, in the way of the view that the deputy was meant to fill the whole place of the judge for whom he was substituted. I will now consider what may be said on the other side. Although I approach the question of the appointment of a deputy in the case of a judicial office as a matter which ought to be most carefully regulated and safeguarded, I must say that I cannot see that any great public mischief or inconvenience could arise from regarding the office of a county court judge as a combination of several independent offices, relating respectively to the several districts in the judge's circuit, which, as I have said, are separately and completely equipped for the performance of judicial functions; or that there are any reasons of public convenience which require that s. 18 should bear the restricted interpretation to which I think its language points. That consideration, of course, is not in itself sufficient to justify me in flinching from giving to the language of the section its strict interpretation, because it must be remembered that the power of delegation in such a case is not given by the common law and

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cannot be inferred from the nature of the office, but can only arise from express statutory enactment. But side by side with the fact that no public inconvenience appears to arise from a county court judge having power to appoint separate deputies for the separate districts of which his circuit is composed is another important fact, which induces me not to dissent from the decision of my learned brothers. Both from admissions made at the bar, and from inquiries which we have ourselves made, it appears that there has been a uniform practice for at least twenty-five years—certainly for a period commencing anterior to the Act of 1888, which though to some extent an amending was mainly a consolidating Act—of allowing a county court judge to appoint separate deputies for his different courts. That practice was not adopted without, I will not say judicial, but, administrative sanction of the highest judicial authority, namely, that of successive Lord Chancellors. I can understand, therefore, that, as my learned brothers hold, s. 18 may conceivably be taken as having been framed by the Legislature with the view that the word "judge," as therein used, means the judge considered as the judge of a particular county court district, though, if so, it is inexplicable to me why it did not introduce some words indicating clearly that intention. It would have been so easy to do so. It might have said " in the case of the absence or unavoidable illness of the judge of any county court district," thus shewing that it was considering the judge in relation to the unit of his jurisdiction. But however that may be, I do not think that, in the face of the view taken by my learned brothers and the practice which has so long prevailed under the sanction of such high authority, I should be justified in saying that s. 18 could not be interpreted as referring to the county court judge as judge of a particular district. Under these circumstances I pity the authority which has, under s. 21, to settle the question what remuneration is to be payable to a deputy who has only been appointed to act for the judge in one or some of his courts. That problem, however, is not before us, and it would not be the only case in which a tribunal has had to perform the task of cutting the Gordian knot in dealing with the provisions of a statute. Under the circumstances I do not dissent from the conclusion arrived at by the

other members of the Court, but I hope that this matter may be made clearer by future legislation.

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Appeals dismissed.

Solicitor for the defendant in the county court action: *R. W. Beckwith.*

Solicitor for the deputy county court judge: *Solicitor to the Treasury.*

Solicitors for the plaintiff in the county court action: *Oswald Hanson & Smith.*

E. L.

[IN THE COURT OF APPEAL.]

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BROWN *v.* FEENEY.

Practice—Payment into Court without Denial of Liability—Action of Libel—Death of Defendant—Abatement of Action—Application by Defendant's Executors for Payment out of Money—Order XXII., *rr.* 1, 5.

In an action of libel the defendant paid money into Court in satisfaction of the claim, without denying liability. The plaintiff did not take the money out of Court, and proceeded with the action. The action being yet untried, the defendant died, and the action therefore abated. The defendant's executors thereupon applied for an order that the money in Court should be paid out to them:—

Held, that their application should be refused and the money paid out to the plaintiff.

APPEAL against the refusal of Walton J. at chambers to order money which had been paid into Court to be paid out to the defendant's executors.

The action was for libel. The defendant had paid into Court, by way of satisfaction, without denying liability, a sum of 150*l.* The plaintiff did not take the money out of Court. After the close of the pleadings, the action being yet untried, the defendant died, and the action therefore abated. The defendant's executors applied at chambers for an order for payment out to them of the money paid in as aforesaid. The master refused the application, and on appeal the learned judge affirmed his decision. The summons appeared to have been headed as issued in the action, which had abated, but it was agreed between the parties that no

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objection should be raised by reason of any technical difficulty arising from the form of the application, but that the Court should be asked to decide as on an originating summons to whom the money should be paid out.

Montague Lush, K.C., and *R. Vaughan Williams*, for the defendant's executors. The payment of the money into Court did not make it the property of the plaintiff; it remained, until taken out, the property of the defendant, and the action being dead, and the purpose for which the money was paid in having therefore become abortive, the defendant's executors are entitled to have it paid out to them. Order XXII., r. 5, and the case of *Gray* v. *Bartholomew* (1), decided on that rule, are conclusive to shew that the money does not on being paid into Court become the property of the plaintiff. In *Gray* v. *Bartholomew* (1), the plaintiff having recovered a farthing damages, it was held that the balance of a sum of 5*l.* paid into Court was rightly ordered to be paid out to the defendant. The action in the present case being dead, and the plaintiff therefore being unable to proceed to trial, or to recover anything at all, he cannot be in a better position than if he had proceeded to trial and recovered less than the amount paid into Court. The action being at an end, rules which apply only to procedure in actions have no further application, and the defendant is therefore entitled, independently of the provisions of Order XXII., r. 5, to have his money handed back to him, the purpose for which it was paid in having failed. But, if Order XXII., r. 5, is still applicable, it is submitted that the Court ought, under that rule, to order the money to be paid out to the defendant's executors. If money had been paid into Court in an action and not taken out by the plaintiff, and the action were dismissed for want of prosecution, the plaintiff would not be entitled to have the money paid out to him. The authorities as to the effect of payment into Court before the Judicature Act are inapplicable: see *Gray* v. *Bartholomew*. (1) [They also cited *Barnes* v. *Jeaffreson*. (2)]

Montague Shearman, K.C., and *Morle*, for the plaintiff. The practice which has uniformly prevailed ever since the earliest

(1) [1895] 1 Q. B. 209.

(2) (1890) 6 Times L. R. 435.

statute which permitted payment into Court in an action shews that money paid into Court with an admission of liability thereupon becomes the property of the plaintiff; for it is clear that he can take it out immediately, whether he accepts it in satisfaction or not, and that his title to it is not affected even if he is non-suited in the action, or the defendant dies pending the action. All the books of practice so state the practice on the subject: see also *Knapton* v. *Drew* (1); *Crockay* v. *Martin.* (2) The rules under the Judicature Act make no difference as to the general practice in this respect: see per Jessel M.R. in *Emden* v. *Carte* (3), and per Thesiger L.J. in *Berdan* v. *Greenwood.* (4)

Order XXII., r. 5, no doubt provides that the Court or a judge may order that the money shall not be paid out to the plaintiff. That provision does not involve the conclusion that the money is not the property of the plaintiff, but merely gives power to the Court or a judge to impound it as a security for costs due from the plaintiff to the defendant, or, at the utmost, it gives a discretionary power to the Court or a judge to divest the plaintiff's interest in the money where special circumstances render it just to do so; no order has been made under that provision in the present case. In *Gray* v. *Bartholomew* (5) there were special circumstances which justified the Court in exercising that discretion. The action was obviously one which ought never to have been brought, the damages recovered being contemptuous. Here it is submitted that, if the Court have a discretion in the matter, they ought not to exercise it in favour of the defendant's executors. The defendant has admitted that he was guilty of a tort of a serious character by paying into Court a substantial sum without denying liability, and the accident that he has died before the case could be brought to trial ought not to be a reason for depriving the plaintiff of his right to the money paid into Court. [They also cited *Palmer* v. *Reiffenstein* (6); *Dunn* v. *Devon and Exeter Constitutional*

(1) (1733) Barnes, 279.
(2) (1736) Barnes, 281.
(3) (1881) 19 Ch. D. 311, at p. 317.
(4) (1878) 3 Ex. D. 251, at pp. 256, 257.
(5) [1895] 1 Q. B. 209.
(6) (1840) 1 Man. & G. 94.

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Newspaper Co. (1); *Coughlan* v. *Morris* (2); *Best* v. *Osborne.* (3)]

R. Vaughan Williams, for the defendant's executors, in reply.

Cur. adv. vult.

March 24. VAUGHAN WILLIAMS L.J. In this action for libel a sum of money was paid into Court by the defendant without a denial of liability. The plaintiff did not accept it in satisfaction and take it out. While the money was still in Court, and the action remaining untried, the defendant died, and upon the principle actio personalis moritur cum persona the action is no longer alive. The question therefore arises as to what ought to be done with the money in Court. The executors of the defendant applied by what it has been agreed shall be taken to be an originating summons for an order that the money should be paid out to them. The judge in chambers refused to make that order, and the defendant's executors now appeal to this Court. In my opinion, that refusal was right. The matter lies really in a small compass, though the point is a new one. I do not propose to go into the history of the law as to payment of money into Court under bygone statutes; I propose to deal only with the rules made under the Judicature Acts and the present practice which now regulates the matter. Money is now paid into Court under the provisions of Order XXII., r. 1, which provides that "any defendant may, before or at the time of delivering his defence, or at any later time by leave of the Court or a judge, pay into Court a sum of money by way of satisfaction, which shall be taken to admit the claim or cause of action in respect of which the payment is made; or he may with a defence denying liability (except in actions or counter-claims for libel or slander) pay money into Court which shall be subject to the provisions of rule 6." I do not think that it was disputed, when the case was argued, that, if money is paid in without a denial of liability and the plaintiff takes it out but not in satisfaction, he is entitled to go on with the action and claim damages ultra. Rule 5 of Order XXII. makes special provision as to what is to be done in

(1) [1895] 1 Q. B. 211. (2) (1880) 6 L. R. Ir. 405.
(3) (1896) 12 Times L. R. 419.

the case of money paid into Court without a denial of liability, namely, that "the money paid into Court shall be paid out to the plaintiff on his request, or to his solicitor on the plaintiff's written authority, unless the Court or a judge shall otherwise order." I have no doubt myself that, if this money had been taken out under that clause of r. 5, the plaintiff would have been entitled to reply that the sum was not sufficient to satisfy his claim and to claim damages ultra. In those circumstances we have to consider whether, the defendant having died, and the action being at an end, the plaintiff is still entitled to take the money out under r. 5. So far as the rules are concerned, in my opinion the plaintiff is not entitled to take it out. It was argued that the moment the money was paid in without a denial of liability, inasmuch as that constituted an admission of the cause of action to the amount of the money so paid in, the money from that moment became the plaintiff's money, and that the rule which enabled him to take it out was only the necessary consequence of the money having so become his money. There is a good deal to be said for that contention, but, in my opinion, the case of *Gray* v. *Bartholomew* (1) shews that it is wrong. That case shews that the money does not become the property of the plaintiff, that he merely gets the right under the rule to take it out of Court, subject to the power of the Court to order otherwise, and that he gets nothing more. The head-note in that case states that: "In an action for slander the defendant paid 5*l.* into Court. The plaintiff recovered a farthing damages, and judgment was entered for the defendant with costs. The judge directed that the money paid into Court, less one farthing, should be paid to the defendant. On appeal:—*Held*, that the judge had power to make such an order." That decision is inconsistent with the money having become the property of the plaintiff; because it is inconceivable that any Court should make an order taking away the money from the plaintiff after it has become his property. Lord Esher M.R., after reading the last clause of r. 5 of Order XXII., said: "The meaning of that is that the Court or a judge may order that it shall not be paid to the plaintiff. To whom, then, is it to be paid? It must be paid either to the

(1) [1895] 1 Q. B. 209.

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Vaughan Williams L.J.

plaintiff or to the defendant, and if it is not to be paid to the one, it must ex necessitate rei be paid to the other. It seems to me that Order XXII., r. 5, was passed for the express purpose of giving the judge, in certain cases, power to deal with money paid in by the defendant, and that it gave jurisdiction to the judge in this case to make the order appealed against." It seems to me that in the present case we must take it that, if the case had been tried, the judge who tried it would have had power to order the money to be paid out to the person to whom he might think it just that it should be paid out. I do not think that that power is one which necessarily can only be exercised under the rules. In my opinion when money is paid into Court the Court must have power to say what shall be done with it, though circumstances may have ousted the operation of the rules with regard to it. What, then, should the Court now say should be done with this money? We must see what are the reasons why it should be paid out to the one party or the other respectively. The plaintiff is entitled to say that his cause of action was admitted and the amount of damages. The defendant's executors say that the money continued to be the defendant's money after it was paid in, and that the cause of action is now dead, and that therefore the money should be returned to them. I do not think that the reasons put forward by the defendant's executors are sufficient. It seems to me that prima facie the right thing to do is to order the money to be paid out to the plaintiff, his cause of action being admitted by the defendant, and the amount of the damages. The question was put during the argument as to what would happen if an action were dismissed for want of prosecution after money had been paid into Court, and I felt myself some doubt whether in such a case the Court would have jurisdiction to order the money to be paid out to the plaintiff. Since the argument my brother Stirling has informed me that there are cases decided in the Court of Chancery which shew that the Court has, after the dismissal of an action for want of prosecution, exercised jurisdiction with regard to the question to whom money which had been paid in should be paid out. That confirms the view which I have expressed to the effect that the Court has in this case power to order to whom the money in

question shall be paid. The Lord Justice will doubtless refer to those cases, and I will therefore say no more about them. For these reasons I think the appeal should be dismissed.

STIRLING L.J. On the language of the rules it appears to me that the plaintiff in an action in which money is paid into Court in satisfaction without denial of liability is entitled to receive that money, unless the Court or a judge intervenes and otherwise orders, and is also entitled, if he thinks fit, to go on with the action for damages ultra. I am confirmed in this view by what was said by Thesiger L.J. in *Berdan* v. *Greenwood* (1) and by all the members of the Court in *Emden* v. *Carte* (2) as to the provisions of the rules on the subject then in force, which were substantially to the same effect as those of the present rules. The power of making an order to prevent the plaintiff from receiving the money paid in is no doubt reserved to the Court in the interests of justice, and in order to obviate any injustice which might otherwise arise, so long as the action is going on, but a defendant applying for an order to prevent the plaintiff from receiving the money would be required to shew that some injustice would arise in the event of the money being paid out to the plaintiff. In this case the defendant has died, and the action is therefore at an end, and consequently no order can be made in the action. The legal personal representatives of the defendant are not parties to the action, and cannot be made parties to it. Whether, under the circumstances, the plaintiff could without an order now take out of Court the money paid in it is not necessary to decide. The legal personal representatives of the defendant have made an application for payment out to them of the money. I think that we have jurisdiction to entertain that application. The point has been considered in the Court of Chancery. I would refer on this subject to the case of *Wright* v. *Mitchell* (3), where, after a bill had been dismissed for want of prosecution, the Court made an order for the payment out of money which had been paid into Court. In the report of that case it is stated that the registrar had declined to draw up the

(1) 3 Ex. D. 251, pp. 256, 257. (2) 19 Ch. D. 311.
(3) (1811) 18 Ves. 292.

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Stirling L.J.

order on the ground that, the bill having been dismissed, the Court had no jurisdiction; but, on application to the Lord Chancellor, he said that the Court had jurisdiction to make an order for payment of the money out of Court, and directed the order to be drawn up. In *Wynne* v. *Jackson* (1) Lord Eldon L.C., in dealing with a case the circumstances of which were no doubt of a different character, gives reasons which shew why the Court must have this jurisdiction. In that case the plaintiff in a suit to restrain proceedings on bills of exchange had obtained an interim injunction on bringing into Court the amount of the bills, but the suit was ultimately dismissed. The Lord Chancellor said: "If a bill is dismissed where money has been brought into Court by the plaintiff, the Court must part with the money to some one or other; and it appears to me that, supposing the order which dismisses the bill to be right, it cannot direct the money to be paid back to the plaintiff." The principle of those decisions seems to me to apply to this case, where the action is at an end by reason of the death of the defendant, and cannot be revived. Therefore I think we should have jurisdiction to order this money to be paid out to the defendant's personal representatives; but, in order to justify us in exercising that jurisdiction, I think they ought to shew such grounds for depriving the plaintiff of his right as the defendant would have had to shew, if he had been alive and the action were still in existence. It does not appear to me that they have succeeded in so doing.

FLETCHER MOULTON L.J. I am of the same opinion. I think that the Court has jurisdiction to say to whom this money should be paid out, and that, under the circumstances, the defendant's executors are not entitled to it.

Appeal dismissed and money ordered to be paid to the plaintiff.

Solicitors for plaintiff: *Churchman & Winser, for G. H. Hindley, Liverpool.*

Solicitors for defendant's executors: *Field, Roscoe & Co., for Pinsent & Co., Birmingham.*

(1) (1826) 2 Russ. 351.

E. L.

BROND *v.* BROOMHALL.

1906
March 16.

Ship—Invalid Mortgage—Registration of—Power of Court to expunge from Register.

Where a transfer of an interest in a ship, void by reason of fraud or for any other cause, has been registered, the Court has power, by virtue of its inherent jurisdiction, to rectify the register by ordering the entry of the void transfer to be expunged.

Trial before Phillimore J. without a jury.

The plaintiff having purchased the ship *Briton* executed a mortgage of the ship to the vendor to secure the payment of a part of the purchase-money. At the same time he signed and handed to the defendant, who had negotiated the purchase, a blank form of mortgage. He alleged that he did so at the request of the defendant, so that the defendant might fill it up in favour of the vendor in the event of the first mortgage being destroyed. The defendant subsequently, in pursuance of an alleged agreement in that behalf, filled up the blank form as a second mortgage of the *Briton* to himself, to secure a sum of 1500*l.* alleged by him to be due from the plaintiff to him upon account current, and he procured the said mortgage to be registered.

The action was brought for a declaration that the defendant was not entitled to be registered as a mortgagee of the ship, for the delivery up and cancellation of the document purporting to be a mortgage to the defendant, and for an order that the entry of the mortgage be expunged from the register. The judge found that the plaintiff did not owe the defendant as much as 1500*l.*, and that there never was any such agreement to mortgage the ship to the defendant as the defendant alleged, and he accordingly ordered the cancellation of the document.

Scrutton, K.C., and *Maurice Hill*, for the plaintiff. It is desirable that the document, besides being declared void, should also be removed from the register, but doubts have been entertained as to the Court's jurisdiction to alter the register. Though s. 30 of the Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), gives the Court power to "make an order prohibiting for a time

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specified any dealing with a ship or any share therein," that Act does not confer any express power to order an entry to be expunged from the register. It appears that for as long a period as thirty-four years no order has been made to expunge a mortgage from the register. But it is contended that the Court has the necessary power under its inherent jurisdiction.

J. A. Hamilton, K.C., and *Gregory*, for the defendant.

PHILLIMORE J. I will order the entry to be expunged.

Order for rectification of register.

Solicitors for plaintiff: *Cattarns & Co.*
Solicitors for defendant: *Smith & Co.*

J. F. C.

1906
April 2.

DARLING *v.* RAEBURN.

Ship—Charterparty—Charter of Ship for Voyage—Implied Condition that Shipowner will not use Ship in Manner prejudicial to the Charterer—Carriage of Bunker Coal intended for use on future Voyage.

The plaintiffs chartered the defendants' ship to load "a full and complete cargo . . . . not exceeding what she can reasonably stow and carry over her tackle, apparel, provisions and furniture," and proceed therewith to two or three ports of discharge. On arrival of the ship at her first port of discharge the defendants took on board a large quantity of bunker coal intended for use, not upon the existing voyage, but upon some prospective voyage to be commenced after her final discharge. In consequence of the loading of the coal, the ship, on arriving at her next port of discharge, had to be lightened before she could get over the bar, whereby the plaintiffs were put to considerable expense. But for the loading of the coal she would have been able to enter the port without lightening:—

Held, that under such a charterparty the shipowner is not entitled to load, to the disadvantage of the charterer, more bunker coal than is reasonably necessary for the seaworthiness of the ship upon the chartered voyage and for the due performance of that voyage; that there is an implied term in the contract that the ship shall, except as aforesaid, be used only for the purposes of the charterers; and that the defendants had consequently committed a breach of their contract and were bound to recoup the plaintiffs the expense to which they had been put.

TRIAL before Kennedy J. without a jury.

By a charterparty dated December 27, 1904, the plaintiffs

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chartered the defendants' ship *Balmoral* to load at Australian ports a "full and complete cargo of wheat $\frac{\text{and}}{\text{or}}$ flour . . . . not exceeding what she can reasonably stow and carry over her tackle, apparel, provisions and furniture," and, being so loaded, to proceed thence "to two or three ports in South Africa between Delagoa Bay and Cape Town, both inclusive . . . . or nearest safe anchorage, and there lighten at receiver's expense as much of the cargo as may be found necessary to allow steamer to enter at all times of high water such port" and there deliver the same. The *Balmoral* loaded a full cargo at various Australian ports and sailed for Durban, East London, and Algoa Bay. On arrival at Durban she discharged cargo to the weight of 662 tons, partly for the purpose of lessening her draught and enabling her to get over the bar at East London, which was her next port of discharge. After discharging the 662 tons she drew only 21 ft. 1 in., which was amply sufficient to allow of her entering the port of East London. But the master took on board at Durban 800 tons of bunker coal, which had the effect of increasing her draught by two feet. This coal was not intended for use upon the chartered voyage, but was taken on board in expectation that the ship on arrival at Cape Town would go on her next voyage to the River Plate, and in view of the fact that the price of coal was much higher at Cape Town than at Durban. When the *Balmoral* arrived at East London it was found that she could not cross the bar, and she had to discharge 727 tons into lighters before she could get to the wharf. The cost of this lighterage, 181*l.* 15*s.*, was paid by the charterers under protest; and the action was brought to recover it back from the defendants.

Scrutton, K.C., and *Roche*, for the plaintiffs. The expenditure which was incurred at East London was the result of a breach of contract on the part of the defendants in taking on board coal at Durban which was not wanted for the voyage. Where a ship is chartered for a voyage, the shipowner is entitled and bound to have on board sufficient tackle and furniture, which in the case of a steamship would include coal, to render her seaworthy for the purposes of that voyage; but, subject to that, he is bound to place the whole carrying capability of the ship at the disposal

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of the charterer. After providing for the tackle, &c., he was by the terms of the charterparty to receive on board as much cargo as the ship "can reasonably stow and carry." The word "stow" there refers to the cargo space to which the charterer is entitled; the word "carry" to the lifting power of the ship to which he is entitled. It was not enough for the defendants to leave the holds vacant; they were bound, further, not to do any act to unnecessarily depress the ship and thereby prevent the plaintiffs from loading in those holds as full a cargo as they otherwise would be able to do. No doubt the master was entitled to take on board at Durban sufficient coal for a voyage to Cape Town, with possibly a further allowance for contingencies, but he was not entitled to take in coal to be used on another voyage.

J. A. Hamilton, K.C., and *Raeburn*, for the defendants. It was not intended by the charterparty that the charterer should be entitled to have the ship afford a lifting power sufficient to support a certain weight of cargo. If the charterers required that, they should have expressly stipulated for it. There are forms of charter in common use in certain trades, such as the Black Sea Ore Charter and the River Plate Coals Charter, in which provision is made that the ship shall not exceed a certain draught. But in the absence of such a provision there is no restriction on the right of the master to load as much bunker coal as he pleases, whether for the chartered voyage or for any other voyage. Indeed the provision that any lightening that might be found necessary was to be done "at receiver's expense" points directly to this conclusion. In *Carlton Steamship Co.* v. *Castle Mail Packets Co.* (1) it was held that a ship chartered for a voyage from Maryport to Delagoa Bay was entitled to take on board before the loading of the cargo commenced a quantity of bunker coal in excess of what would be required for the voyage, the charter being silent upon the subject; and that the charterers could not complain that the loading of the cargo had been rendered more difficult by reason of the excessive bunker coal having increased the ship's draught, and thereby increased the risk of her getting neaped at the port of loading.

(1) (1897) 2 Com. Cas. 173. This case was reversed on appeal on another point: 2 Com. Cas. 286.

Scrutton, K.C., in reply. In the *Carlton Steamship Co.'s Case* (1) it was proved that a vessel going to South Africa usually takes with her a much larger quantity of coal than is wanted for the first voyage because of the difficulty and expense of procuring coal in South Africa. That case turned upon the existence of a custom of that particular trade; here no such usage is suggested.

KENNEDY, J. The question for decision in this case, which is one of some difficulty, depends upon the construction of the charterparty. I have felt that there is a great deal to be said in favour of Mr. Hamilton's contention that, as there is in the charterparty an express provision that the ship on arrival at any one of the charterparty ports is to "lighten at receiver's expense as much of the cargo as may be found necessary to allow steamer to enter at all times of high water such port," the expense of lightening in the present case ought not to be charged to the ship. There is also much to be said for the view that where parties enter into elaborate contracts such as this charterparty, the party who seeks to construe the contract as implying something beyond what is actually expressed ought to make out a strong case in support of his construction. But I cannot help thinking that in a case of this kind, where there is a contract to carry by sea from one port to another port, the essence of the transaction, in the absence of an agreement to the contrary, is that the charterer is to have the full advantage of the ship, except so much as it is necessary that the shipowner should retain to enable him to perform his part of the contract in the way of keeping the ship seaworthy and keeping sufficient fuel on board for the due prosecution of the voyage and the safety of those on board, and that subject to that the ship is to be used and managed in such a manner as may be to the best advantage of the charterer. What happened in this case was that at Durban a quantity of coal was taken on board, which admittedly was not necessary for the particular voyage to which the charterparty related, and was taken on board to such an extent as to create the necessity to do a certain amount of lightening before the ship could

(1) 2 Com. Cas. 173.

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enter the port of East London. It is admitted that if no more coal had been taken than was sufficient for the particular voyage, allowing a fair margin for contingencies, no lightening would have been necessary. Mr. Hamilton contended that in any of the space not wanted for cargo the shipowner might, without regard to the question of increasing the ship's draught, load as much fuel as he chose to be used on any future voyage, upon the ground that by the terms of the charterparty if lightening was necessary in order to enter a port the charterer was to pay for it. I cannot think that that view is in accordance with the provision that the charterer is to load a full and complete cargo "not exceeding what she can reasonably stow and carry over her tackle, apparel, provisions and furniture." I think those latter words indicate the limit of what the shipowner is to load on his own account. It seems to me that the charterer is entitled to say to the shipowner: "During the time you are fulfilling your engagement to me under this charterparty you are bound not to use your ship for your own convenience in future voyages if by so doing you will deprive me of advantages which I should have if, in the use of your ship as a receptacle for coal or ballast, you merely did that which is reasonably necessary for the purposes of the voyage and the safety of the ship on that voyage." There is, so far as I am aware, no authority upon this question, but, construing the contract according to what I take to be the more reasonable view, I am of opinion that the plaintiffs are entitled to succeed. Reliance was placed by Mr. Hamilton on the case of *Carlton Steamship Co.* v. *Castle Mail Packets Co.* (1) But I think that case is different from the present. There there was a finding of fact that it was a perfectly well-known practice for vessels sailing for South Africa to take on board sufficient coal, not merely for that voyage, but also for a further voyage. Moreover (although this may perhaps not be important), the fact is that in that case the loading of the coal took place before any cargo was put on board at all. Here, after the commencement of the voyage, there was a loading of coal not in accordance with any recognized practice,

(1) 2 Com. Cas. 173.

nor for the needs of the voyage, and to such an extent as could not fail to prejudice the charterers.

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Judgment for the plaintiffs.

Solicitors for plaintiffs: *Botterell & Roche.*

Solicitors for defendants: *Lowless & Co.*

J. F. C.

LANCASHIRE AND CHESHIRE COAL ASSOCIATION AND RICHARD EVANS & CO. *v.* LONDON AND NORTH WESTERN RAILWAY COMPANY AND LANCASHIRE AND YORKSHIRE RAILWAY COMPANY.

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April 3.

Railway Rates—Short Distance—Merchandise "conveyed" by the Company partly on its own Railway and partly on another Railway.

By clause 11 of the schedule to the London and North Western Railway Company (Rates and Charges) Order Confirmation Act, 1891 (54 & 55 Vict. c. ccxxi.), where merchandise is conveyed for an entire distance which does not exceed a certain specified distance (varying according as station terminals are chargeable at one end or at both ends of the transit, or at neither), the company may make the charges for conveyance authorized by the schedule as for the specified distance: "Provided that where merchandise is conveyed by the company partly on the railway and partly on the railway of any other company the railway and the railway of such other company shall for the purpose of reckoning such short distance be considered as one railway":—

Held, that the expression "conveyed" in the proviso refers, not to the contract of carriage, but to the physical haulage, and that if during the portion of the transit which takes place on the railway of the other company the goods are hauled by the engines of that other company, the proviso does not apply, notwithstanding that the goods were delivered to the London and North Western Railway Company to be carried to their destination at a through rate.

BEFORE the Railway Commissioners. Joint application of colliery owners and railway companies.

Richard Evans & Co., Limited (hereinafter called the colliery company), are the owners of certain collieries in the county of Lancashire, connected by sidings at Edge Green, Golborne, and Earlestown Haydock respectively with the railway of the London and North Western Railway Company. The said sidings join the railway at points a few miles to the south of Wigan, as hereinafter mentioned.

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The colliery company are in the habit of consigning large quantities of coal from their said sidings to Pagefield siding, which is situate on and connected with the line of the Lancashire and Yorkshire Railway Company a little way to the north of Wigan, as hereinafter mentioned.

In consigning this traffic the colliery company (as they are entitled to do) deal only with the London and North Western Railway Company, who accept and forward the traffic, quote the rates, and receive from the colliery company payment of the charges due in respect of the said traffic.

The said traffic passes over the railways of the said respective railway companies as follows:—

From Edge Green siding to Pagefield siding:

	Miles	Chains.
Over the London and North Western Railway to Wigan Junction, a distance of	3	68
Over the Lancashire and Yorkshire Railway from Wigan Junction to Pagefield siding	1	19
Making a total distance of	5	7

From Golborne Colliery siding to Pagefield siding:

	Miles.	Chains.
Over the London and North Western Railway to Wigan Junction	4	48
Over the Lancashire and Yorkshire Railway from Wigan Junction to Pagefield siding	1	19
Making a total distance of	5	67

From Earlestown Haydock to Pagefield siding:

	Miles	Chains
Over the London and North Western Railway to Wigan Junction	7	78
Over the Lancashire and Yorkshire Railway from Wigan Junction to Pagefield siding	1	19
Making a total distance of	9	17

The arrangement for working the traffic between the two railway companies is that the said traffic is worked from the said colliery sidings to Pagefield siding in the following manner:—

The traffic is taken from the colliery sidings to the Bamfurlong sidings of the London and North Western Railway, the distance from each of the colliery sidings to the Bamfurlong sidings being respectively as follows:—

	Miles.	Chains.
Edge Green Colliery	1	61
Golborne Colliery	2	41
Earlestown Haydock	5	71

From Bamfurlong sidings to Wigan Junction, a distance of 2 miles 7 chains, the traffic is taken by the engines of the Lancashire and Yorkshire Railway Company, which company's engines continue to convey the traffic over their own line from Wigan Junction to Pagefield siding a further distance of 1 mile 19 chains.

Under and by virtue of the London and North Western Railway Company (Rates and Charges) Order Confirmation Act, 1891 (54 & 55 Vict. c. ccxxi.), and the order and schedule of maximum rates and charges, and the classification of merchandise traffic thereby confirmed, coal is comprised in Class A of the said classification, and the London and North Western Railway Company are entitled to charge on the portion of their railway over which the traffic in question travels, in respect of merchandise comprised in Class A, for the first twenty miles, or any part of such distance, per ton per mile 0·95*d*. And under and by virtue of the Railway Rates and Charges No. 10 (Lancashire and Yorkshire, &c.) Order Confirmation Act, 1892, and the order and schedule of maximum rates and charges and classification of merchandise traffic thereby confirmed, coal is comprised in Class A of the said classification, and the Lancashire and Yorkshire Railway Company are entitled to charge on all parts of their railway, in respect of merchandise comprised in Class A, for the first twenty miles, or any part of such distance, per ton per mile 1*d*.

The said orders and schedules of the London and North

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Western Railway Company and of the Lancashire and Yorkshire Railway Company each of them contain the following provision, the words in brackets ("except as in hereinafter specially provided") being, however, omitted in the Lancashire and Yorkshire schedule :—

Clause 11. "Where merchandise is conveyed for an entire distance which does not exceed in the case of merchandise in respect of which a station terminal is chargeable at each end of the transit three miles, or in the case of merchandise in respect of which a station terminal is chargeable at one end of the transit four-and-a-half miles, or in the case of merchandise in respect of which no station terminal is chargeable six miles, the company may (except as hereinafter specially provided) make the charges for conveyance authorized by this schedule as for three miles, four-and-a-half miles, and six miles respectively: Provided that where merchandise is conveyed by the company partly on the railway and partly on the railway of any other company the railway and the railway of such other company shall, for the purpose of reckoning such short distance, be considered as one railway."

The traffic is conveyed from private siding to private siding, and is invariably carried in trucks provided by the owners of the traffic. There is, therefore, no charge payable for station terminals, and no charge payable for the use of trucks belonging to either of the said railway companies.

The London and North Western Railway Company claim to be entitled to charge in respect of the said traffic from Edge Green to Pagefield siding, and from Golborne to Pagefield siding, in each case per ton :—

	d.
For 6 miles on the London and North Western Railway Company at 0·95*d.* per mile.	5·7
For 6 miles on the Lancashire and Yorkshire Railway at 1*d.* per mile	6·0
Making in all	11·7

In respect of the traffic from Earlestown Haydock to Pagefield

siding the said railway company claim to be entitled to charge per ton:

	s.	d.
For 7 miles, 78 chains on the London and North Western Railway at 0·95*d.* per mile.	0	7·6
For 6 miles on the Lancashire and Yorkshire Railway at 1*d.* per mile . . .	0	6
	1	1·6

The colliery company claim that in the circumstances aforesaid under the schedules of maximum rates and charges and classification of merchandise traffic aforesaid, and upon the true construction of clause 11 of the said orders and schedules respectively, the London and North Western Railway Company are not entitled to charge the several rates claimed by them in respect of the traffic aforesaid, but are entitled only to make charges in respect thereof not exceeding the following:—

From Edge Green and Golborne Colliery respectively to Pagefield siding, per ton . .	6*d.*
From Earlestown Haydock to Pagefield siding, a charge per ton for 7 miles 78 chains on the London and North Western Railway . .	*d.* 7·6
1 mile 19 chains on the Lancashire and Yorkshire Railway	1·25
Making a total charge per ton of .	8·85

Differences having thus arisen between the Lancashire and Cheshire Coal Association and Richard Evans & Co., Limited, on the one hand, and the London and North Western Railway Company and the Lancashire and Yorkshire Railway Company on the other hand, they agreed to refer to the Court for their decision the following differences:—

1. Whether in the circumstances above set out the London and North Western Railway Company is entitled to charge the colliery company, in respect of the traffic aforesaid, the rates and charges respectively claimed by the said railway company as aforesaid.

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2. Or whether the said railway company is entitled to charge the colliery company, in respect of the traffic aforesaid, the rates and charges claimed to be chargeable by the colliery company as aforesaid.

3. Or what are the several maximum rates and charges with which the railway company is entitled to charge the colliery company in respect of the said traffic.

Balfour Browne, K.C., *C. A. Russell*, K.C., and *Darlington*, for the colliery owners. The proviso to clause 11 of the schedule applies. The coal is conveyed by the London and North Western Railway Company partly on its own railway and partly on the Lancashire and Yorkshire Railway. The word "conveyed" in the proviso means "is contracted to be carried." Here the only contract of carriage is with the London and North Western Railway Company, who undertake to carry the coal from point to point at a through rate. The colliery owners deal exclusively with that company, and know of no other. The fact that the coal is hauled over the Lancashire and Yorkshire Railway by Lancashire and Yorkshire engines is immaterial. The proviso was enacted in the interests of the customers of the railway, but if the word "conveyed" is to be read as meaning "hauled," it is open to the two railway companies by a private arrangement between themselves to defeat the intention of Parliament.

Cripps, K.C., *Moon*, K.C., and *J. A. Simon*, for the railway companies. "Conveyance" means physical conveyance, and not a mere contract of carriage. In every case of conveyance there are certain initial expenses, such as putting on the engine and marshalling the trucks, which are wholly irrespective of the distance the goods are carried, and the object of the short distance clause is to recoup the company those initial expenses. Having regard to this consideration it is obvious that there is no real risk of the companies manipulating the traffic for the purpose of enabling them to take an unfair advantage of the short distance clause. The second company is under no obligation to admit the engines of the first company on to its line, but is entitled to do the haulage itself. If it exercises its right of doing the haulage it necessarily incurs all those expenses which a

re-commencement of the conveyance involves, and for those expenses it must be paid.

Balfour Browne, *K.C.*, in reply.

BIGHAM, J. We are agreed as to the interpretation which ought to be put upon this clause. It provides in the operative part that "Where merchandise is conveyed for an entire distance which does not exceed . . . . six miles the company may . . . . make the charges for conveyance authorized by this schedule as for . . . . six miles." "The company" there means the particular company in whose Act the clause is found. Then there comes the proviso that "Where merchandise is conveyed by the company"—that is, the company in whose Act the clause is found—"partly on the railway and partly on the railway of any other company the railway and the railway of such other company shall for the purpose of reckoning such short distance be considered as one railway." I think Mr. Cripps' view of the meaning of the word "conveyed" is the right one. I think it means "actually carried," and that the word is not to be interpreted as referring to any contract of carriage made between the goods owner and the railway company. Applying, then, the proviso to the facts of this case, I find that the only railway company, in whose Act the clause is found, which has conveyed this coal partly on its own railway and partly on the railway of another company is the Lancashire and Yorkshire Railway Company. Inasmuch as that company carries the coal from Bamfurlong siding to Pagefield siding, that is to say, partly on the London and North Western Railway and partly on its own railway, it comes within the proviso, though, as the total distance so carried by it is less than six miles, the proviso has, under the circumstances of this case, no practical effect. But the London and North Western Railway Company do not carry the goods over two railways at all, and therefore are not affected by the proviso. The result is that each of the two railway companies must be entitled to charge with reference to the distance over which it carries the traffic, the London and North Western Railway Company from the several collieries to Bamfurlong siding, and the Lancashire and Yorkshire Railway Company from

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Bamfurlong siding to Pagefield. The questions submitted to us must therefore be answered in favour of the railway companies.

Judgment for the railway companies.

Solicitors for the colliery owners: *Rawle, Johnstone & Co., for T. Ratcliffe Ellis, Wigan.*

Solicitor for the London and North Western Railway Company: *C. de J. Andrewes.*

Solicitor for the Lancashire and Yorkshire Railway Company: *A. de C. Parmiter, Manchester.*

J. F. C.

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March 21, 22.

LITCHFIELD *v.* DREYFUS.

Money-lender—Definition—Exception—"Business not having for its primary Object the lending of Money"—Discounting Bills of Customers and Friends—Financing a Business—The Money-lenders Act, 1900 (63 & 64 *Vict. c.* 51), *s.* 6, *sub-s.* (*d*).

The Money-lenders Act, 1900, s. 6, defines a money-lender to be "every person whose business is that of money-lending, or who . . . . holds himself out in any way as carrying on that business," but excepts sub-s. (*d*), "any person bona fide carrying on any business not having for its primary object the lending of money, in the course of which and for the purposes whereof he lends money."

A. carried on business as an art dealer for many years prior to 1903, and in the course of his business it was necessary and incidental thereto to give long credit and to take from his customers bills in payment of the amounts they owed to him for their purchases, and to discount and renew the bills from time to time. In 1903 he retired from the business and sold off his stock by public auction, and took bills for the greater part of the purchase-moneys, which he discounted and renewed from time to time, and some of which were still running. After his retirement he carried on business as an expert art valuer and adviser, and he also assisted two art businesses, in which he was largely interested, by discounting for them their customers' bills and by taking bills for the interest from time to time due on the debentures he held in one of those businesses. He also assisted some old friends in the curio trade, and a few persons with whom he had been connected in business, about ten in all, with loans and by discounting bills for them. He did not advertise

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as a money-lender, and did not discount bills for any outsiders. In an action by A. on bills given him in 1904 for a loan made by him to an old customer:—

Held, that A. was not, and never had been, a money-lender within the meaning of s. 6 of the Money-lenders Act, 1900; and that, as to the bills given on the sale of his stock and renewed and still running, he came within exception (*d*) in the section.

THIS was an action tried by Farwell J., sitting as an additional judge of the King's Bench Division.

The plaintiff sued on three bills of exchange. Two of them were dated June 10, 1904, for 50*l*. each, accepted by the defendant, and payable three months after date to the order of the plaintiff. The third bill was dated August 11, 1904, for 70*l*., and was accepted by the defendant and payable three months after date to the order of Nyburg & Co., art dealers, and was indorsed by them to the plaintiff in payment of a debt which they owed to him. The defendant admitted the plaintiff's claim, but by way of counter-claim and set-off alleged that the plaintiff was indebted to him in large sums—(1.) for commission on goods bought of the plaintiff by a Mr. Mainwaring on the introduction of the defendant; (2.) for commission on bills of Mr. Mainwaring discounted by the plaintiff on the introduction of the defendant; (3.) for the value or proceeds of sale of a gold snuff-box and certain other articles deposited by the defendant with the plaintiff. At the trial of the action the defendant, who was an art dealer, obtained leave to amend his defence by adding an allegation that the plaintiff was a money-lender, and, not being registered under the Money-lenders Act, 1900, could not recover on the bills. The plaintiff denied that he was a money-lender.

It appeared from the plaintiff's evidence that for many years prior to the year 1903 he had carried on a large and very successful business as a dealer in antiques, curios, and works of art. It was necessary and incidental to the carrying on of that business to give long credit to his customers, and the usual course was for them to pay for their purchases with their bills, which he discounted and renewed from time to time. He also sold to other art dealers, who generally paid for their purchases either with their own bills or with the bills of their customers, which he discounted and renewed from time to time. In this

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way he had discounted bills to the amount of many thousands of pounds. Mr. Mainwaring was not introduced to him by the defendant. He had known Mr. Mainwaring since 1879, but had had few dealings with him directly. He had known the defendant for many years, and had had extensive dealings with him. The defendant generally paid for his purchases with bills of Mr. Mainwaring, which he discounted, and, after deducting the discount and price of the goods, handed the defendant the balance in cash. The total amount of Mr. Mainwaring's bills which he had discounted for the defendant came to about 5000*l.*, exclusive of renewals. He had never agreed to pay the defendant any commission. The two bills of 50*l.* were for a loan of 100*l.*, which was made up of 21*l.* 19*s.*, which was applied to pay an old debt due to him from the defendant, and of 78*l.* 1*s.*, for which he gave his cheque to the defendant. The 100*l.* was lent on the articles in question. In June, 1903, he sold off his stock-in-trade by public auction at Foster's, previous to retiring from the business of an art dealer in the following September. The sale occupied several days, and realized very large sums, for most of which he had to accept payment in bills. Many of these bills he had to negotiate and renew from time to time and gradually to reduce, and some of them had not yet run off. After the sale he made over what remained of his business and trade connection to Mr. Amor, who had been his manager many years, and lent him money to start in the business. Since his retirement from business as an art dealer he had assisted two or three art businesses, in which he was personally largely interested, when they came to him and asked for help. Bailey's was one of these businesses. It was a limited company, and he held a large amount of its debentures. He had made advances to Bailey's and had discounted their customers' bills that they brought to him, and had taken their bills in payment of the debenture interest due to him from time to time. He had discounted bills for Bailey's up to about 10,000*l.*, including renewals. Cray was another of these businesses. He had discounted customers' bills for Cray up to about 3000*l.* He, in fact, financed these two businesses. Nyburg & Co. were also in art business. They were old curio friends, and he had assisted them by discounting bills for them to about 3000*l.*

Besides these businesses there were some old curio friends and others with whom he had been connected in business, about ten in all, that he had assisted from time to time, when they came to him for help, with loans and by discounting bills for them, but not to a large extent. He had always discounted bills and renewals at the rate of 15 per cent. per annum, and had charged interest on advances at the rate of 10 per cent. per annum. He had never advertised as a money-lender, and had never done any business with outsiders. He now carried on the business of an expert valuer and adviser on art objects. He had a room at Amor's for his correspondence, and there he transacted his business. His name-plate was on the door outside, with the words "Valuer for Art Objects" upon it.

Rawlinson, K.C., and *H. Dobb*, for the defendant. It is admitted that the onus is on the defendant to prove that the plaintiff is a money-lender. But it is submitted that on the plaintiff's own evidence he does not come within exception (*d*) in s. 6 of the Act. Whatever his transactions may have been prior to his retirement from business as an art dealer in 1903, he has since that date been carrying on the business of money-lending. It is not disputed that his rates for discounting and renewing bills and for interest are most reasonable, but since 1903 he has discounted and renewed bills to very large amounts, not only for the purpose of winding-up his art business, but also to assist the businesses he has mentioned and old customers and friends. That is money-lending within the meaning of s. 6. Having a room at Amor's as an expert valuer is merely colourable.

Low, K.C., and *P. B. Morle*, for the plaintiff. There is no direct authority on the construction of s. 6, but there are some observations by Kekewich J. in *Bonnard* v. *Dott.* (1) It is submitted that the plaintiff is not a money-lender within the section. Not a single witness has been called in support of the defendant's allegation. [They were stopped.]

FARWELL, J. after stating that he did not accept the defendant's evidence, and after holding that there had been no

(1) (1905) 92 L. T (N.S.) 822.

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Farwell J.

commission agreement and that the plaintiff was entitled, after giving the defendant credit for certain sums, to judgment on the bills for 107*l.*, continued:—The only question that remains is this. The defendant asked for leave to amend by alleging that the plaintiff is a person whose business is that of a money-lender within the Money-lenders Act, 1900, and therefore cannot recover anything at all under these bills because, as is admitted, he is not registered under the Act. Having regard to the decision of Buckley J. in *Victorian Daylesford Syndicate, Ld.* v. *Dott* (1), that a man who carries on business as a money-lender, and is not registered under the Act, cannot recover, it is important to determine what is a money-lender within the definition in s. 6 of the Act, which contains the exception of "any person bona fide carrying on the business of banking or insurance or bona fide carrying on any business, not having for its primary object the lending of money, in the course of which, and for the purposes of which, he lends money." Now, for many years past the plaintiff has been well known in the art world as a dealer in antiques, and the like. It is not seriously suggested by the defendant's counsel that the plaintiff while carrying on his said business ever carried on any other business than that of a dealer in antiques. It is quite true, as he has detailed before me, that in carrying on that business it was necessary that some method of credit should be adopted, and it usually took the form of bills. Bills appear to be a necessary incident to the financial requirements of persons who are extravagant enough to give the prices asked for these antiques. One has read of the old-fashioned money-lender whose sales of "genuine Titians," and such like, formed part of his money-lending, so that a man who borrowed money took three-fourths of it in pictures or parrots. But there is no suggestion of that kind as regards the plaintiff. He carried on a perfectly legitimate business as an art dealer, and as incidental to that business he took bills from his customers in payment of the amounts due to him. Then in June, 1903, he sold his stock-in-trade at Foster's, carrying on his financial year until September in that year, when he retired from the business and handed over, not the whole of the goodwill, because there was

(1) [1905] 2 Ch. 624.

no right to use his name, but the business premises and the local goodwill attached thereto and such assistance as he could give by personal introduction to Mr. Amor, the man who had been his faithful manager for many years. The sale occupied several days, and very large sums were realized, and bills were taken for a great portion of the purchase-money. In my judgment, the subsequent negotiations and dealings with those bills, whether by renewal or otherwise, come within the exception in s. 6 as incidental to the carrying on of a legitimate business, the primary object of which was not the lending of money, but the sale of antiques. Therefore, so far as regards bills arising out of that sale, I hold that no money-lending business was carried on.

But it appears that the plaintiff has also since June, 1903, assisted two art businesses in which he is largely interested, and which he finances by taking and discounting the bills of the customers of those businesses and by taking bills for the interest due to him on the debentures which he holds in one of those businesses. There is nothing in that which can be called the business of money-lending. Further, he has also, since June, 1903, assisted old friends with whom he had been connected in business, amounting in all to about ten persons. They come to him and ask him for assistance from time to time, and he gives them money on easier terms apparently than they could get elsewhere, and takes their bills or the bills of their customers. But not every man who lends money at interest carries on the business of money-lending. Speaking generally, a man who carries on a money-lending business is one who is ready and willing to lend to all and sundry, provided that they are from his point of view eligible. I do not of course mean that a money-lender can evade the Act by limiting his clientele to those whom he chooses to designate as "friends" or otherwise: it is a question of fact in each case. In the present case, the plaintiff's business is now that of an art valuer and adviser. He has obtained from Mr. Amor a room in his premises where he has his name up on a plate as an adviser on art matters. He is a well-known author of books on artistic matters. So far as regards the few persons whom he has assisted since 1903, either by way

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of discounting bills of other persons for them or by discounting their own bills, it would be a straining of the language of the Act to hold that a man who so obliges friends is carrying on the business of a money-lender. The Act was intended to apply only to persons who are really carrying on the business of money-lending as a business, not to persons who lend money as an incident of another business or to a few old friends by way of friendship. This particular Act was supposed to be required to save the foolish from the extortion of a certain class of the community who are called money-lenders as an offensive term. Money-lending is a perfectly respectable form of business. Nobody says that bankers are rascals because they lend money. It is part of their everyday business. Bill-broking is well known in the City of London, and is a respectable business so long as it is carried on in a respectable manner. But the Legislature in casting its net has cast it very wide; and if a man is carrying on the business of a money-lender he is within the Act, although he may be free from all blame morally. The question in each case is, Does he carry on the business of a money-lender? That depends on the facts of the case. On the facts of this case I hold that the plaintiff does not carry on and never did carry on business as a money-lender. Under the circumstances, the amendment ought never to have been asked for, and so far as that defence is concerned, it fails entirely. The result is that, although it is possible I might have made some exception with regard to the costs as between the claim and counter-claim if this defence had not been raised, I order the defendant to pay all the costs of the claim and counter-claim. There will be judgment for the plaintiff for 107*l.* and costs.

Solicitors: *G. C. L. Fry; Julius A. White.*

H. L. F.

1905

Dec. 6, 8.

MAPLE & CO. (PARIS), LIMITED *v.* COMMISSIONERS OF INLAND REVENUE.

Revenue—Stamp Duty—"Conveyance on Sale"—"Matter or Thing to be done in the United Kingdom"—Property in France—Conveyance executed in France—Consideration payable in England—Stamp Act, 1891 (54 & 55 *Vict. c.* 39), *s.* 14, *sub-s.* 4, *and s.* 54.

By a deed, executed in France, property in France was transferred by one English company to another English company, the consideration for the transfer being shares in the latter company which were to be issued, and delivered to the former company, in England. Stamp duty having been claimed as on a conveyance on sale in Sched. I., to the Stamp Act, 1891, on the ground that the deed related "to a matter or thing to be done" in the United Kingdom within s. 14, sub-s. 4, of the Act:—

Held, that the deed was a conveyance on sale, but that the provision as to the issue and delivery of shares in England was not an essential part of the deed, and that stamp duty was, therefore, not payable.

Case stated by the Commissioners of Inland Revenue pursuant to s. 13 of the Stamp Act, 1891.

On June 22, 1905, an instrument was presented on behalf of Maple & Co. (Paris), Limited, the appellants, to the Commissioners of Inland Revenue, under the provisions of s. 12 of the Stamp Act, 1891, for the opinion of the Commissioners as to the stamp duty with which the instrument was chargeable.

The instrument in question was called a deed of "apport," and was in French. The translation of the deed, so far as is material, was as follows:—

"Deed of 'apport'

"Between the English company, Maple & Co., Limited, hereinafter called the 'old company,' registered on April 8, 1881, whose registered address is in London, with a branch in Paris, No. 5, rue Boudreau, of the one part, and the English Company, Maple & Co. (Paris), Limited, hereinafter called the 'new company,' registered on May 10, 1905, whose registered address is in London, of the other part. It has been agreed upon as follows:—

'Apport.'

"The old company by these presents brings into the new company, under all guarantees in fact and in law, the property of

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which the description follows and which the latter accepts." (Here followed a description of the property, which comprised a business established in Paris at No. 5, rue Boudreau, which had hitherto been carried on as the French branch house of the old company, the goodwill, fixtures, fittings and materials, the plant, and all other movable objects of every description used for carrying on the business, the advantages resulting from the contracts relating to the said branch, and the benefit of any commercial transactions entered into by the old company at this branch since January 1, 1905, together with the premises of the business in Paris).

The deed further provided that, "in consideration of the 'apport' granted by these presents, the new company allots to the old company 72,000 shares in its share capital of a nominal value of 1*l.* each. Out of these 72,000 shares, 40,446 are allotted in consideration of the 'apport' of the movable property, and 31,554 in consideration of the 'apport' of the immovable property above mentioned. The said shares are not yet issued (created), but they will soon be, and will be issued and delivered in England to the old company within as and from this day."

All the property comprised in the instrument was situate in France. The instrument was executed by both parties in France on June 5, 1905.

By the law of France applicable to the case the instrument operated, when executed, to pass the property in all the matters comprised therein as from the date thereof as between the parties to the instrument, but until the instrument had been registered with certain formalities a purchaser for value of any of the property without notice of the instrument might get a better title than the appellants.

There is in France a duty called "droit de vente," analogous to the stamp duty in England on a conveyance on sale, but the instrument in question would not be liable to that duty.

The Commissioners, having regard especially to the provisions in the instrument as to the allotment of shares, were of opinion that it related to a matter or thing to be done in the United Kingdom, and that it, therefore, came

within the provisions of the Stamp Act, 1891. Inasmuch as it operated to pass the property comprised therein as between the parties, they held that it was chargeable under the head "Conveyance on Sale" in the First Schedule to that Act (1), and they assessed the duty upon the whole of the shares which were the consideration therefor at 10*s.* for every 100*l.* thereof, amounting in all to 360*l.*

Assuming the instrument to be properly chargeable as a conveyance on sale, no question was raised as to the amount of the duty chargeable.

The questions for the opinion of the Court were—(1.) whether the said assessment of the Commissioners is correct; (2.) if not, to what duty (if any) the said instrument is liable.

Danckwerts, K.C., and *Beddall*, for the appellants. First, the document is not a "conveyance on sale" within the meaning of s. 54 of the Stamp Act, 1891. An "acte d'apport" in French law is not an instrument of sale, but one under which property is brought into common stock for partnership purposes. The case ought to be sent back for the French law on this point to be more fully and correctly stated. Secondly, assuming the document is a conveyance on sale, it was executed abroad, and relates entirely to property situate abroad. It is, therefore, not liable to stamp duty: *Ximenes* v. *Jaques* (2), *In re Wright and Commissioners of Inland Revenue* (3); *Gilchrist* v. *Herbert* (4); *Commissioners of Inland Revenue* v. *Muller & Co.'s Margarine.* (5) The Crown relies on s. 14, sub-s. 4, of the Stamp Act, 1891 (6),

(1) Stamp Act, 1891 (54 & 55 Vict. c. 39), s. 54: "For the purposes of this Act the expression 'conveyance on sale' includes every instrument, and every decree or order of any court or of any commissioners, whereby any property or any estate or interest in any property, upon the sale thereof is transferred to or vested in a purchaser, or any other person on his behalf or by his direction."

(2) (1795) 1 Esp. 311.

(3) (1855) 11 Exch. 458.

(4) (1872) 20 W. R. 348.

(5) [1901] A. C. 217.

(6) Sect. 14, sub-s. 4: "Save as aforesaid, an instrument executed in any part of the United Kingdom, or relating, wheresoever executed, to any property situate, or to any matter or thing done or to be done, in any part of the United Kingdom, shall not, except in criminal proceedings, be given in evidence, or be available for any purpose whatever, unless it is duly stamped in accordance with the law in force at the time when it was first executed."

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and it will be contended that the issue and delivery of shares was a matter or thing to be done in England, and that the instrument is therefore under that sub-section liable to be stamped; but the sub-section only applies where the thing to be done is the thing which gives rise to the liability to stamp duty. Here, the only thing to be done in England is the issue and delivery of shares which were the consideration for the sale, and no duty is payable in respect of that issue and delivery. The duty is not claimed in respect of the sale, but in respect of the conveyance on sale, and for the purpose of the transfer of the property it was quite unnecessary to insert in the deed any provision as to the place or manner in which the consideration was payable. Sect. 59 of the Act makes contracts for sale chargeable with stamp duty, but that section does not apply here, because this contract was made abroad. [They referred to *Foster & Sons* v. *Commissioners of Inland Revenue.* (1)]

Sir R. B. Finlay, A.-G., and *Rowlatt*, for the Crown. Sect. 14 sub-s. 4, applies to this case, because the instrument is one relating to a matter or thing to be done in the United Kingdom. By the instrument certain property in France is transferred from one party to the other, and the whole consideration for that transfer, viz., the issue and delivery of shares, is to be carried out in the United Kingdom. Although there may be contracts containing two independent and separable agreements, this is not a contract of that sort. The payment of the consideration is of the very essence of the transaction, and cannot be regarded as mere surplusage. The argument that the thing to be done in the United Kingdom must be a thing which gives rise to the liability to the stamp duty is without foundation, and involves the introducing of additional words into s. 14, sub-s. 4. The instrument is a conveyance on sale within s. 54. The French law is correctly stated in the case, and, whether or not "apport" means bringing property into a partnership, it is quite clear that it covers the present case, which is not partnership, but sale: *Foster & Sons* v. *Commissioners of Inland Revenue.* (1)

Danckwerts, K.C., replied.

Cur. adv. vult.

(1) [1894] 1 Q. B. 516.

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Dec. 8. WALTON J. read the following judgment:—The main question in this case is whether a certain instrument is chargeable with duty as a "conveyance on sale" under the Stamp Act, 1891. The instrument in question was executed in France and was in the French language. It was called an "acte d'apport." It was made between Maple & Co., Limited, called the old company, whose registered address is in London, and who had a branch in Paris, and Maple & Co., (Paris) Limited, called the new company, whose address is also in London. By this instrument the old company brings (or in French "fait apport") into the new company certain property which was all of it situate in France. It is admitted that the effect of the instrument as between the parties was to transfer the property from the old company to the new company. The instrument went on to state that in consideration of the above the new company allotted to the old company 72,000 shares in its share capital of a nominal value of 1*l.* each, 40,446 being in respect of the movable property and 31,554 in respect of the immovable property. The instrument stated that the shares were not yet issued (created), but that they would be, and would then be issued and delivered in England to the old company. [The learned judge read the definition of a conveyance on sale contained in s. 54 of the Act, and continued:—] The first contention on behalf of the appellants was that if the instrument was interpreted according to French law there was in fact no sale. It was said that the effect of the instrument according to French law was not sufficiently stated in the case, and I was asked to refer the case back to be restated. There is no doubt that the conception of partnership and companies is not the same in the law of France as it is in the law of England, and it appears that the transaction between the two companies will not be treated as a sale according to French law—at all events for revenue purposes. It may be (as alleged by the appellants) that according to French law the transaction would be regarded as a contribution of capital by the old company to the new company, in respect of which the old company would become an associate in the new company, with an interest measured by the 72,000 shares which the old company was to acquire in the new company. Even if the case depended upon

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this question, I should not think it necessary to refer the case back for restatement. There is no doubt as to the facts, which are not, in my opinion, altered by the view taken of them, as alleged, by the French law. Both companies were English companies constituted according to the law of England. In fact, the old company did not become partners in the new company. In fact, the property was transferred by the old company to the new company in consideration of the 72,000 shares. This was a sale within the meaning of the Stamp Act.

The second question was whether the instrument was chargeable at all, having regard to the fact that it was executed in France and was a transfer of property situated in France. [The learned judge read s. 14, sub-s. 4, of the Stamp Act, 1891, and continued:—] For the Commissioners of Inland Revenue it is said that the instrument related to a matter or thing to be done in England—that is to say, to the issue and delivery in England of the 72,000 shares to the old company. It is obvious that the "acte d'apport" does contain an agreement for, and therefore relates (amongst other things) to, the allotment and delivery of these shares. But it is said for the appellants that the "acte d'apport" is chargeable as a conveyance on sale only because and in so far as it is a transfer of the property by the old company to the new company. And this unquestionably is so. The duty charged by s. 54 is not upon the sale or contract of sale, but upon the instrument of transfer made upon a sale. It is further contended that for the purpose of the transfer the statement as to the allotment of shares is unnecessary and superfluous. This contention seems to me to be correct. If the instrument were chargeable as a contract for the sale of the property, I think that it would probably be correct to say that the contract related (amongst other things) to something to be done in England. The consideration is an essential part of the contract. But it is not unimportant to observe that the instrument is not chargeable as a contract to sell. Such contracts are chargeable under s. 59 of the Stamp Act. The "acte d'apport" is not within that section, because it was not made in England or Ireland. The question, therefore, comes back to this—whether, because the instrument which operates as a transfer of the

property contains a statement of the consideration for the transfer and such consideration is something to be done in England, it is within s. 14, sub-s. 4. It seems to me clear that an instrument of transfer of French property executed in France is not chargeable under the sub-section of s. 14 merely because it happens to contain some unnecessary reference to something done or to be done in England. The statement of the consideration was for the purpose of the transfer unnecessary. If it had not been stated the instrument would not have been chargeable. It seems to me that it does not become chargeable by the accident that the consideration has been mentioned. For these reasons I think that the instrument in question is not chargeable as a conveyance on sale, and there must, therefore, be judgment for the appellants.

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Judgment for appellants.

Solicitors for appellants: *Peake, Bird & Collins.*
Solicitor for respondents: *Solicitor of Inland Revenue.*

F. O. R.

GREAT CENTRAL RAILWAY COMPANY, APPELLANTS *v.* BANBURY UNION, RESPONDENTS.

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Dec. 14.

Poor Rate—Rateable Value—Railway—Interest on Cost of Construction.

The appellants, a railway company, under an agreement with the G. Railway Company constructed a short piece of line connecting the railway systems of the two companies for the purpose of a mutual interchange of traffic. On this piece of line there were no stations or sidings, and it originated no traffic. No railway company other than the appellants and the G. Company could have been found to acquire the line:—

Held that, for the purpose of arriving at the rateable value of the line, the capital sum expended on its construction was not an element which could be taken into consideration.

CASE stated by the quarter sessions for the county of Oxford. The appeal is against a poor rate made May 19, 1904, for the parish of Wardington, in which that part of the appellants' line of railway which lay in the said parish was rated at 1390*l.* gross estimated rental and 795*l.* rateable value.

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The total length of the said line, which runs from the parish of Eydon, in the county of Northampton, to the parish of Warkworth, in the county of Oxford, is 8 miles 18 chains, of which 1 mile 47 chains are in the parish of Wardington. This line of 8 miles 18 chains is connected at the northern end with the appellants' line at Woodford, and at the southern end with the line of the Great Western Railway Company at Banbury, thus forming a main line route from the north to the south and west of England.

The line was constructed by the appellants in accordance with an arrangement made with the Great Western Railway Company for the more convenient interchange of traffic, and under the powers of the Great Central Railway Act, 1897, and was opened for traffic in 1900.

The cost of constructing the line was approximately 280,000*l.*, and in pursuance of the said arrangement, and under the provisions of the said Act, the Great Western Railway Company advanced to the appellants the sum of 280,000*l.* at the rate of interest of 3½ per cent. per annum. It was not suggested that there had been any change in the conditions affecting the two companies since the passing of the said Act.

There are no stations or sidings on the line, nor does the line itself originate any traffic. The whole traffic on the said line consists of through traffic passing from the appellants' system to that of the Great Western Railway Company, and vice versa.

It was admitted that persons or companies other than the appellants and the Great Western Railway Company could not be found to acquire the line. It was not disputed that the only advantage or use of the line to the appellants and the Great Western Railway Company arises during the existence of an agreement for the mutual interchange of traffic, and that in the absence of such an agreement the line would be of no value, and could not be let to either the appellants or the Great Western Railway Company.

For the appellants it was contended that, inasmuch as the line is an integral portion of the undertaking of the appellants, its rateable value in the parish of Wardington must depend on the actual net earnings of the line within the parish, such earnings

being obtained owing to the mutual agreement for interchange of traffic above mentioned, and that to ascertain such net earnings there must be allocated to the line in the parish a mileage proportion of all rates and fares received by the appellants and the Great Western Railway Company for the whole journey in respect of all traffic passing over the line, and from the receipts so ascertained there must be deducted the usual and proper allowances for working expenses, Government duty, rental of stations separately assessed, trade profits, interest on tenant's capital, and the statutory deductions for maintenance and renewal. Assessed on this principle the agreed rateable value of the line is 64*l.* per mile, and the rateable value of the line within the parish of Wardington is 102*l.*

For the respondents it was contended that the assessment committee, in ascertaining the rateable value of this property, were entitled to take into account the 3½ per cent. interest paid by the appellants to the Great Western Railway Company on the sum of 280,000*l.* advanced by the latter to the appellants for the purpose of constructing the line in question in accordance with the Great Central Railway Act, 1897, and that the said interest might properly be regarded as evidence of the rent which either the appellants or the Great Western Railway Company were prepared to pay for the said line, and that as such it was uncontradicted, that the said interest, being at the rate of far more than 1000*l.* per mile, was evidence that the appellants would be willing to give a rent for the line in the parish sufficient to support the rate appealed against, and that the geographical position of the said line indicated that it had a value apart from the actual net earnings on the line, and in the alternative that the said line might reasonably be expected to let to the appellants or the Great Western Railway Company at a percentage of the gross receipts carried on the said line which would justify the assessment appealed against.

The quarter sessions overruled the contention of the appellants that the mileage proportion of receipts should be the sole basis of valuation. They held that the interest on the cost of construction of the line was a matter which they were entitled to take into account as an element of calculation in ascertaining the

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rateable value, and, having so taken it into account, they determined that the property would properly be assessed at 1390*l.* gross estimated rental and 795*l.* rateable value.

Balfour Browne, K.C., *Sir E. Boyle, K.C.*, and *Snagge*, for the appellants. The line in question is an integral part of the Great Central system, and therefore ought to be assessed on the ordinary parochial principle of a mileage proportion of the total net earnings of the line. The fact that it originates no traffic of itself is immaterial. The Court below proceeded upon the authority of the judgments of the Court of Appeal in *North and South West Junction Ry. Co.* v. *Brentford Union.* (1) In that case a railway company, having constructed a line which formed a connecting link between the railways of three other companies, leased it to those companies jointly in perpetuity at an annual rent, and it was held by the Court of Appeal that the rateable value of the line was not to be ascertained as if it were an integral part of the lines of the three companies using it, but was to be based on the rent which the hypothetical tenant would give for it as an independent line, of which the rent paid was evidence. On appeal the House of Lords (2) held that no question of law was raised by the special case, and remitted it to the arbitrator who had stated it to find on the facts what was the proper value. He then found that the proper value was to be arrived at by the application of the parochial principle, and upon the case going back to the House of Lords, they awarded the appellants their costs. That case, therefore, is no authority in support of the present respondents' contention.

W. Ryde and *Cecil Walsh*, for the respondents. The question is what rent the Great Central or any other railway company would be willing to pay for this line? It had a contributive value both to the Great Central Company and to the Great Western Company. Both were anxious to have it made, and both were willing to expend the money which it cost in order to secure its construction. The yearly interest on the actual cost of constructing that part of the line which lies within the parish of Wardington may be taken as some criterion for the purpose of

(1) (1887) 18 Q. B. D. 740. (2) (1888) 13 App. Cas. 592.

arriving at the actual value of that part of the line. It is not contended that the cost of construction is conclusive of the value, but it is evidence of the rent which they would be willing to pay to a hypothetical landlord who constructed the line for them and could not construct it for less. In *Reg.* v. *Eastern Counties Ry. Co.* (1), where the railway company rented a line of railway, it was held that the rent paid was an element in arriving at the rateable value—in other words, the parochial principle is not necessarily the right one. In *South Eastern Ry. Co.* v. *Dorking* (2), where a railway was leased to the appellants at a rent based on a percentage on the capital raised for the construction of the line, it was indeed held that the rent was not the sole criterion of the rateable value, but the majority of the Court were of opinion that it was a matter to be taken into account. In *London and North-Western Ry. Co.* v. *Cannock* (3), where a branch line yielded no profit of itself, but contributed to the traffic and profit of the main line, it was held that the branch was to be assessed not merely with respect to its own earnings, but with respect to the value to the company as bringing a profit to the main line. Blackburn J. said: "What would be the elements of the rent? Why, amongst others, the capacity to add to the takings of the main line." The Court decided that the parochial principle was not applicable. In *Reg.* v. *London and North-Western Ry. Co.* (4) the appellants had become possessed of a branch line on the terms of guaranteeing to the former owners an annual sum based on the expense of making the line. The branch communicated with the lines of three other companies, each of which would have been willing to acquire it on the terms of guaranteeing the same payment. It was held that the fact that those companies were willing to pay that sum was an element to be taken into consideration in ascertaining the rateable value of the line. In *North and South West Junction Ry. Co.* v. *Brentford Union* (5) Lord Halsbury conceded that the rent paid for the line might be taken into consideration. The arbitrator having indicated on the special case alternative principles of calculating the value, one of

(1) (1854) 23 L. J. (M.C.) 96, n.
(2) (1854) 3 E. & B. 491.
(3) (1863) 9 L. T. 325.
(4) (1874) L. R. 9 Q. B. 134.
(5) 13 App. Cas. 592.

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which was to admit the rent as evidence without treating it as conclusive, Lord Halsbury said: "I am not prepared to say that . . . . either of the courses suggested, if the facts were found which would render the calculation accurate, would be contrary to the statute. I think it would be impossible to say that either of the modes of calculation is obligatory." His objection was merely to the form in which the special case had been stated by the arbitrator. If, then, the quarter sessions in the present case were entitled to take the cost of construction into consideration, there is no ground upon which to appeal. Unless the Court below has included something which it ought not to have included or excluded something which it ought to have included, the Court of Appeal cannot interfere: per Lord Halsbury, *Mersey Docks and Harbour Board* v. *Birkenhead.* (1)

Balfour Browne, K.C., in reply. The cases cited are all distinguishable. They were all cases of feeding lines which brought traffic into the main line. Here the line is not a feeder, it originates no traffic at all. Moreover, in all the cases cited there was a rent paid eo nomine; here there is not. The payment of interest on the cost of construction is not the same thing as the payment of rent. And in several of them, as in *Reg.* v. *London and North Western Ry. Co.* (2), there was competition, several companies being willing to give the same rent, whereas here there are no other companies, besides the two for whose benefit the line was constructed, who can make use of it. In *London and North Western Ry. Co.* v. *Irthlingborough* (3) Blackburn J. laid it down that the cost of construction of a line is quite irrelevant to the question of rating.

LAWRANCE J. In this case I think judgment must be for the appellants. The Great Central Railway Company were anxious to have a line running from Woodford to Banbury to connect their system with the Great Western system. The Great Western were no doubt also anxious to have the line made, as it would be for the convenience of both of them for the interchange of traffic from one line to the other. They were the only two companies

(1) [1901] A. C. 175 at p. 184. (2) L. R. 9 Q. B. 134.
(3) (1876) 35 L. T. 327.

who had any interest in the matter, for no third company could by any possibility have worked the line. Then an Act of Parliament was obtained for the making of the line by the Great Central Company, and in order to find the capital for making it it was agreed between them and the Great Western Company that the latter should advance the sum of 280,000*l.* at the rate of 3½ per cent. interest. That having been carried out, the question arises as to what is the proper principle on which this short piece of line is to be assessed. It is nothing more than a link which connects the two systems, and it has no station on it nor any means of contributing anything to the railway profits by itself. It was contended by the appellants that the rateable value must depend upon the actual net earnings of the line within the parish, while the respondents, on the other hand, contended that, inasmuch as the appellants had agreed to pay 3½ per cent. on the cost of construction, they were in fact paying a rent, and that rent was the true measure of the annual value of the line. In my judgment the respondents' contention is not correct. It seems to me that what in this case we have to consider is, What would the hypothetical tenant give by way of rent for this piece of line as a ready-made line for the right to work it? For the purpose of arriving at the rent which he could afford to pay he would consider what he could make out of it, what its earnings would be. What it had cost to construct would be perfectly immaterial to him, for his power of making a profit out of it would not be greater or less according as it cost much or little. The question is, What is it worth at the time of the assessment? I can well imagine a case in which a line might be worth to a particular company more than it was earning, as a means of preventing competition. There might be competitors who would be anxious to get the line, and who would give more than it was worth from a business point of view; and in most of the cases to which our attention has been called there were competitors. Here there is no possibility of competition. The two lines are working together, and the moment they cease working together the whole value of the line is gone as regards both of them. And there could be no outside competitor, for no third company could possibly come in and work it. I am of

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opinion that the contention of the appellants was right, and that this appeal must be allowed.

RIDLEY J. I am of the same opinion. I am satisfied that the respondents' contention that it was right to take into account the interest paid on the capital required for the construction of the line is unsound, and for the reasons given by my brother Lawrance. I would merely add this: The cases referred to by Mr. Hyde do not, in my opinion, point to the conclusion in support of which he cited them. In *South Eastern Ry. Co.* v. *Dorking* (1), a railway having been constructed by the Reading, Guildford and Reigate Railway Company, the South Eastern Company took a lease of it at a rent equal to $5\frac{1}{2}$ per cent. on the 600,000*l.* expended in making it. After that lease had run for a few years a fresh arrangement was made, and the two companies amalgamated on the terms of the shareholders in the Reading, &c., line receiving annuities equivalent to the former rent. The Court agreed in saying that neither the rent nor the amount of the annuities was the proper criterion of the annual value, but that it was the present value, which might be more or less than the sum that the parties had agreed to give for it. But it is impossible to contend from that case that because the rent agreed to be paid by the South Eastern Company was equal to $5\frac{1}{2}$ per cent. on the capital expended, therefore interest on capital is the right test. If in the present case there existed the additional fact that the Great Central Railway Company had agreed to lease the line from the Great Western Company at a rent which was equivalent to such and such interest on the capital, then there would be evidence that the interest payable on the capital advanced was an element to be taken into consideration in ascertaining the rateable value; but otherwise it seems to me that interest on capital has nothing to do with the matter. Then in the case of *Reg.* v. *London and North Western Ry. Co.* (2), where the Court held that the guaranteed interest on the capital cost of construction was a sum which might be taken into account in ascertaining the rateable value, they did so upon the ground that there were other competing companies which were anxious to get the

(1) 3 E. & B. 491. (2) L. R. 9 Q. B. 134.

benefit of the line, and were willing to pay as rent a sum at least as high as the amount of the guaranteed interest. But that is a very different thing from saying that the interest on capital represented the rateable value. In that case, by reason of the competition, the rent which the hypothetical tenant would have paid might have been much more than the interest. In the case of *London and North Western Ry. Co.* v. *Irthlingborough* (1), Blackburn J. expressly said that the cost of construction of a line "is quite irrelevant to the question of rating, which depends only upon what a hypothetical tenant would pay by the year." I agree that the appeal must be allowed.

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Judgment for the appellants.

Solicitor for appellants: *D. H. Davies.*
Solicitors for respondents: *Hopwood & Sons.*

J. F. C.

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Dec. 21.

Waterworks—Injurious Affection of Land—Loss of Support—Authorized Working—Compensation—Interest—Waterworks Clauses Act, 1847 (10 & 11 *Vict. c.* 17), *ss.* 6, 12.

By a special Act which incorporated the Waterworks Clauses Act, 1847, the defendants were authorized to make and maintain certain waterworks, including a well and pumping station. After the completion of the works the defendants, for the purpose of their undertaking, took, by means of pumping operations, such water as was found in and under the lands taken by them for constructing their works, and in so doing caused damage to the plaintiff's premises by the abstraction of a bed of wet running silt which formed the sub-soil and support of the plaintiff's land. In respect of the damage thus sustained the plaintiff claimed compensation under s. 12 or s. 6 of the Waterworks Clauses Act, 1847, and, an arbitration having been held, was awarded compensation by the umpire. In an action by the plaintiff to recover the sum awarded and costs and interest:—

Held, that the plaintiff's premises had been injuriously affected; that s. 12 empowered the defendants to take water not only for the purpose of the construction of the authorized works, but also, after their completion, for the purpose of the undertaking, and that compensation was,

(1) 35 L. T. 327

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therefore, payable to the plaintiff under s. 12; that, assuming the power to take water after the completion of the works was derived from the special Act, and not from s. 12, the plaintiff's premises had been injuriously affected by the exercise of the powers authorized by the special Act within the meaning of s. 6 of the Waterworks Clauses Act, 1847, so as to entitle the plaintiff to be paid compensation under s. 6.

Held, also, that interest at 4 per cent. from the date of a demand in writing was payable on the amount of compensation awarded and on the taxed costs.

The rule of construction of Acts of Parliament that the effect of words perfectly clear in themselves is not limited by general words in a preamble applies equally to the heading of a section.

ACTION tried at the Liverpool Assizes by Bray J. without a jury.

The plaintiff claimed 1200*l.* and costs due under the award of an umpire in an arbitration under the Waterworks Clauses Act, 1847, and interest at 4 per cent. on the 1200*l.* and costs from the date of the award, or alternatively from the date of a demand in writing made by the plaintiff to the defendants.

The defence to the action was that the award was ultra vires and in excess of jurisdiction, and that on the findings of the umpire the defendants were under no legal liability to the plaintiff. The facts are fully stated in the judgment.

Leslie Scott, for the plaintiff.

Horridge, K.C., and *F. E. Smith*, for the defendants.

Cur. adv. vult.

Dec. 21. BRAY J. read the following judgment:—This action was brought to recover the sum of 1200*l.* and costs, which had been awarded to the plaintiff by the umpire, Mr. Gott, as compensation for injurious affection to his land, dwelling-house, and premises, known as Brookside Upton, by the exercise by the defendants of the powers conferred upon them by the Birkenhead Corporation Gas and Water Act, 1881. Under this Act the defendants had acquired a piece of land at Ford Bridge, and had sunk a well or borehole on that land distant about 150 yards from the plaintiff's dwelling-house, and, prior to November, 1904, had been pumping large quantities of water from the well or borehole. The plaintiff alleged that by means of this pumping a large quantity of silt had been abstracted from under his house, and a settlement

had been caused owing to the support being withdrawn, and great damage had been done to the house. In consequence of this, on November 18, 1904, he made a claim against the defendants for injurious affection, and, desiring that the amount of compensation should be decided by arbitration, he appointed an arbitrator. The defendants denied that the plaintiff was entitled to any compensation, and appointed their arbitrator under protest. The arbitrators differing, Mr. Gott was appointed as umpire, and during the course of the arbitration, the point of law being raised that the plaintiff was entitled to no compensation, even if his house was damaged in the way suggested, counsel agreed that the umpire in his award should find certain questions of fact and state his answers to certain agreed questions in his award. This was done, and the umpire made his award on June 9, 1905, and found as follows:—

"I award, settle and determine: 1. The corporation have by the authorized working after the completion of the authorized works occasioned damage to the property of the claimant, that is to say, by from time to time taking such water as was found in and under the lands taken by the corporation for constructing their works and authorized under the powers to be taken for the purposes of their undertaking. 2. (*a*) Such damage was not occasioned by the abstraction of water only; (*b*) such damage was occasioned by the abstraction of water which carried with it silt from under the premises of the claimant. 3. The weight of the buildings upon the land has not caused the damage. 4. The amount of damage done to the said hereditaments of the claimant is 1200*l*., which sum is to be paid by the said corporation to the said Isaac Fletcher." Then he deals with the costs which are also claimed, that is, the corporation "shall also pay the costs of and incident to the arbitration and this my award."

During the argument before me a difference of opinion arose between counsel as to the meaning of the answer 2 (*b*), and it was agreed that I should put such further question or questions to the umpire as I should think necessary, and the umpire's answers should be taken as part of his award, and that this should not prevent either party from appealing

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from my decision. Accordingly I put the following question to the umpire: "Was the substance or object which lay directly under and formed the support of plaintiff's land, and the abstraction of which caused subsidence and damage, (*a*) a bed of wet or running silt, as contended by the plaintiff, or (*b*) a stratum of water in which some silt was held in suspense, as contended by the defendants"; which he answered in these words: "The sub-soil which lay directly under and formed the support of the plaintiff's land was a bed of wet running silt, which was drawn away by the pumping operations of the corporation." On this award the plaintiff brought his action. The case was tried before me without a jury. No evidence was called, as the facts were not in dispute.

The plaintiff contended that the defendants had been authorized by s. 12 of the Waterworks Clauses Act, 1847, which was incorporated into the special Act, to take the water; that it was by the exercise of this power that the damage was caused; that but for the authority conferred upon the defendants by the Act the wrong would have been actionable, inasmuch as by it the plaintiff was deprived of the support of his house; and that s. 12 or s. 6 of the Waterworks Clauses Act entitled him to compensation. The defendants contended that s. 12 of the Waterworks Clauses Act conferred no power upon them, except to take water for the purposes of construction; that the water was not taken for that purpose, and, therefore, s. 12 gave no right to compensation; and that the power to take water after construction was impliedly given by the special Act, s. 20, to which the plaintiff replied that, if it was so given, he was entitled to compensation under s. 6 of the Waterworks Clauses Act. The defendants further denied that the wrong would in any case have been actionable.

I will consider the latter point first. It seems to me that any difficulty that existed is cleared away by the answer given to me by the umpire. This finding brings the case exactly within *Jordeson* v. *Sutton, Southcoates and Drypool Gas Co.* (1) I am, of course, bound by that decision, but I agree with it, and it establishes that, but for the powers

(1) [1899] 2 Ch. 217.

conferred upon them by Act of Parliament, the defendants would have been guilty of committing an actionable nuisance at common law, which entitled the plaintiff to damages. I must, therefore, hold that the plaintiff's land and dwelling-house were injuriously affected.

I will now consider s. 12 of the Waterworks Clauses Act, 1847, in order to see if compensation is given for injurious affection. The object of the Act was to provide general clauses which should be applicable to every case, where it was proposed to confer powers on promoters to construct waterworks and supply water. One of the provisions which would be necessary in every such case was to give the promoters power to obtain water, and one would naturally expect, therefore, to find in the Act a general clause giving the promoters this power. If it cannot be found in s. 12 it does not exist. Now, s. 12 says: "Subject to the provisions and restrictions in this and the special Act, and any Act incorporated therewith, the undertakers may execute any of the following works for constructing the waterworks; (that is to say) they may enter upon any lands and other places described on the said plans and in the said books of reference, and take levels of the same and set out such parts thereof as they shall think necessary, and dig and break up the soil of such lands and trench and sough the same, and remove or use all earth, stone, mines, minerals, trees, or other things dug or gotten out of the same; they may from time to time sink such wells or shafts, and make, maintain, alter, or discontinue such reservoirs, waterworks, cisterns, tanks, aqueducts, drains, cuts, sluices, pipes, culverts, engines, and other works, and erect such buildings, upon the lands and streams authorized to be taken by them, as they shall think proper, for supplying the inhabitants of the town or district within the prescribed limits with water. They may from time to time divert and impound the water from the streams mentioned for that purpose in the special Act or the said plans or books of reference, and alter the course of any such streams, not being navigable, and also take such waters as may be found in and under or on the lands to be taken for constructing the works. Provided always that in the exercise of the said powers the undertakers shall do as little damage as can be, and

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in all cases where it can be done shall provide other watering places, drains, and channels for the use of adjoining lands, in place of any such as shall be taken away or interrupted by them, and shall make full compensation to all parties interested for all damage sustained by them through the exercise of such powers." If these words are looked at alone, they are perfectly plain and give the power that one would expect, but it is contended that the general words at the head of the section, "may execute any of the following works for constructing the waterworks," shew that the power must be limited to taking water for the purpose of the construction of the works. Now, it is an established rule of construction of Acts of Parliament that the effect of words perfectly clear in themselves will not be limited by general words in a preamble, and I think that rule applies equally to the heading of a section such as this; but, when the matter is further looked into, it appears still more plain. The quantity of water required merely for the construction of the works would be extremely small, and such as would cause very little damage, if any. Why should compensation be given for that, and not for the much greater damage that might be caused by the continual taking of large quantities of water? Then there are the words "from time to time." What do they mean if the power is only given during construction? There are also in the same part of the section the words "divert and impound." Are the promoters only to be entitled to impound water in their reservoir during construction? This would be absurd. I think I am compelled to give to the words "from time to time . . . . take such waters as may be found in and under or on the lands to be taken for constructing the works" their natural and ordinary meaning; and that they gave the defendants the power to pump from their well or borehole in order to supply their district with water. If this is so, then by the concluding words of s. 12 full compensation is given to all parties interested for all damage sustained by them through the exercise of this power.

But if I am wrong and no such power is given by s. 12, how did the defendants obtain the power? It is said by the defendants that the power was given to them by s. 20 of the special Act under the words, "the corporation may make and

maintain." (1) I will assume that this is so, and then I have to consider s. 6 of the Waterworks Clauses Act. That gives compensation for land injuriously affected by the construction or maintenance of the works thereby authorized, that is, by the special Act authorized, or otherwise by the execution of the powers thereby conferred, and it seems to me that these words are quite wide enough to give compensation for damages caused by pumping, power to do which, by hypothesis, is given by the special Act, whether under the words "make and maintain" or any other words. The defendants placed great reliance on the case of *Hammersmith and City Ry. Co.* v. *Brand.* (2) This was decided on ss. 6 and 16 of the Railways Clauses Act, 1845, and it was suggested that these sections corresponded with ss. 6 and 12 of the Waterworks Clauses Act, 1847, and that the latter sections should receive the same interpretation as the sections of the Railways Clauses Act. The answer to this is that the words of the sections are different, and that in the Waterworks Clauses Act the words are distinctly wider than those in the Railways Clauses Act. It may well be, as Lord Halsbury suggested in *Holliday* v. *Mayor of Wakefield* (3), that the Legislature foresaw that much greater danger and damage was likely to arise from the impounding, diversion or taking of water than the running of locomotives on a railway. It seems to me quite sufficient to say that the sections are not similar, and that it is wholly misleading to try and construe one Act by another Act, and on the ground that the differences between the two are

(1) Birkenhead Corporation (Gas and Water) Act, 1881 (44 & 45 Vict. c. clii.), s. 20: "Subject to the provisions of this Act, the corporation may make and maintain in the line and according to the levels shewn on the deposited plans and sections the waterworks hereinafter described, with all proper wells, tunnels, drifts, adits, pipes, embankments, approaches, tanks, basins, engines, pumps, and other works and conveniences connected therewith respectively. . . . . The waterworks hereinbefore referred to and authorized by this Act are—(1.) a shaft or well (to be sunk to an uncertain depth) and pumping station in the township of Upton, in the parish of Overchurch, or in the township of Bidston-cum-Ford, in the parish of Bidston, near the bridge carrying the road leading from Birkenhead to Upton over the stream known as the Fender; (2.) an aqueduct or line of pipes from the said intended pumping station to the reservoir of the corporation at Flaybrick Hill."

(2) (1869) L. R. 4 H. L. 171.

(3) [1891] A. C. 81.

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small. The safest course is to construe the Act by its own language. In my judgment the plaintiff is entitled to recover the 1200*l.* and the costs. It is not disputed that the costs have to be taxed.

A further claim is made for interest both on the 1200*l.* and on the amount allowed on taxation from the date of the award, or alternatively from the date of the demand, which was on July 7. I do not think it can be said that the amount is payable on a fixed day under an instrument in writing. It is not the duty of an arbitrator under the Lands Clauses Act to direct payment. He merely fixes the amount of compensation, and the costs are payable under the provisions of the Act. But it is said that in a case of injurious affection where no land is purchased the amount awarded for compensation becomes a debt by virtue of the statute. The statute does not so provide in terms, but it is clearly established that an action lies, not merely for the amount of compensation, but for the costs given before taxation: see *Metropolitan and District Ry. Co.* v. *Sharpe*. (1) This must be because they are debts, and, if so, under the statute a jury may award interest if demand in writing with notice that interest will be charged is made. I understand it is admitted that demand was made in proper form on July 7, and I think I am entitled to award interest, and I therefore direct interest from July 7, 1905, at 4 per cent. on the 1200*l.* and on the amount at which costs shall be taxed to be added to those sums, and, as the plaintiff has succeeded, he must have the costs of the action.

Judgment for plaintiff.

Solicitors for plaintiff: *J. F. Harrison & Burton, Liverpool.*
Solicitor for defendants: *A. Gill, Town Clerk, Birkenhead.*

(1) (1880) 5 App. Cas. 425.

F. O. R.

[IN THE COURT OF APPEAL.]

SALAMAN *v.* SECRETARY OF STATE IN COUNCIL OF INDIA.

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Act of State—Annexation of Native State—Confiscation of Property of Infant Ruler—Distinction between his Private and State Property—Assumption of Guardianship by Government—Jurisdiction of Municipal Courts.

Where the East India Company, as representing the Crown, has done acts of such a nature, and under such circumstances, as to lead to the conclusion that those acts were done in the exercise of supreme power, as acts of State, and to negative any intention to give thereby legal rights, whether contractual or otherwise, to an individual or individuals as against the Company, the municipal Courts have no jurisdiction to question the validity of those acts, or to entertain any claim in respect thereof by an individual against the Secretary of State for India, as the successor of the East India Company.

So *held* by the Court of Appeal (Vaughan Williams L.J., Stirling L.J., and Fletcher Moulton L.J.).

By Fletcher Moulton L.J.: Although an act of State cannot be challenged, controlled, or interfered with by municipal Courts, *semble*, its intention and effect may sometimes be to modify and create rights as between the Government and individuals who are, or who are about to become, subjects of the Government, and in such cases the rights arising therefrom may be capable of being adjudicated upon by the municipal Courts.

The East India Company, as representing the Crown, annexed the territory of a native State, and confiscated the State property, granting to the Maharajah, the ruler of the State, who was then an infant, a pension for life. The Company also assumed the custody of his person during his minority, and took possession of his private property. An action having been brought after his death by the trustee in bankruptcy of his residuary legatee against the Secretary of State for India, as the successor of the East India Company, for arrears of the pension, and for an account of the private property, alleging that the Company had undertaken the legal obligations of guardians of and trustees for the Maharajah in respect thereof:—

Held (Fletcher Moulton L.J. dissenting as to the claim in respect of the private property) that, under the circumstances, the acts done by the Company as aforesaid were so clearly done by them as acts of State, in respect of which no action was maintainable, that the action should be summarily dismissed as frivolous and vexatious.

Secretary of State in Council of India v. *Kamachee Boye Sahaba*, (1859) 7 Moo. Ind. App. 476; 13 Moo. P. C. C. 22, followed.

Appeal from an order of Bucknill J. dismissing an action as frivolous and vexatious as after mentioned.

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The plaintiff sued as trustee in bankruptcy of the property of Prince Victor Albert Jay Duleep Singh.

The statement of claim was as follows:—

1. Early in the nineteenth century Runjeet Singh became and was the head of the Sikh Khalsa, or Commonwealth, which was in occupation of a territory known as the Punjab, situated in the north-west of India. The said Runjeet Singh died in the year 1839, and in 1843, after the deaths of three of his sons, who occupied his position, was succeeded by his youngest son, Duleep Singh, then an infant of the age of five years.

2. On or about December 14, 1846, articles of agreement were entered into between the East India Company and certain chiefs and sirdars of the said Sikh Commonwealth, whereby it was agreed, amongst other things, as follows: "I. All and every part of the treaty of peace between the British Government and the State of Lahore, bearing date March 9, 1846, except in so far as it may be temporarily modified in respect to clause 15 of the said treaty by this engagement, shall remain binding upon the two Governments. II. A British officer, with an efficient establishment of assistants, shall be appointed by the Governor-General to remain at Lahore, which officer shall have full authority to direct and control all matters in every department of the State. III. Every attention shall be paid in conducting the administration to the feelings of the people, to preserving the national institutions and customs, and to maintaining the just rights of all classes. IV. Changes in the mode and details of administration shall not be made except when found necessary for effecting the objects set forth in the foregoing clause, and for securing the just dues of the Lahore Government. These details shall be conducted by native officers, as at present, who shall be appointed and superintended by a Council of Regency, composed of leading chiefs and sirdars acting under the control and guidance of the British Resident. V. The following persons shall, in the first instance, constitute the Council of Regency, namely [here followed names], and no change shall be made in the persons thus nominated without the consent of the British Resident, acting under the orders of the Governor-General. VI. The administration of the country

shall be conducted by the Council of Regency in such manner as may be determined on by themselves, in consultation with the British Resident, who shall have full authority to direct and conduct the duties of every department. VII. A British force of such strength and numbers, and in such positions, as the Governor-General may think fit, shall remain at Lahore for the protection of the Maharajah and the preservation of the peace of the country. VIII. The Governor-General shall be at liberty to occupy with British soldiers any fort or military post in the Lahore territories the occupation of which may be deemed necessary by the British Government for the security of the capital, or for maintaining the peace of the country. IX. The Lahore State shall pay to the British Government twenty-two lacs of new Nanuk Shahee rupees of full tale and weight per annum, for the maintenance of this force, and to meet the expenses incurred by the British Government, such sum to be paid by two instalments of thirteen lacs and 20,000 in May or June and eight lacs and 80,000 in November or December of each year. X. Inasmuch as it is fitting that Her Highness the Maharanee, the mother of Maharajah Duleep Singh, should have a proper provision made for the maintenance of herself and dependants, the sum of one lac and 50,000 rupees shall be set apart annually for that purpose, and shall be at Her Highness's disposal. XI. The provisions of this arrangement shall have effect during the minority of His Highness the Maharajah Duleep Singh, and shall cease and terminate on His Highness attaining the full age of sixteen years, or on September 4, of the year 1854, but it shall be competent to the Governor-General to cause the arrangement to cease at any period prior to the coming of age of His Highness, at which the Governor-General and the Lahore Durbar may be satisfied that the interposition of the British Government is no longer necessary for maintaining the Government of His Highness the Maharajah."

3. Afterwards, in or about the month of August, 1847, the said East India Company by a proclamation announced that it felt the interest of a father in the education and guardianship of the Maharajah Duleep Singh, and took and placed him wholly under its tutelage.

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4. Afterwards, on or about March 29, 1849, certain terms (known as the "Terms of Lahore") were agreed on by and between the East India Company and certain members of the said Council of Regency as follows:—"I. His Highness the Maharajah Duleep Singh shall resign for himself, his heirs and his successors, all right, title, and claim to the sovereignty of the Punjab, or to any sovereignty power whatever. II. All the property of the State, of whatsoever description and wheresoever found, shall be confiscated to the Honourable East India Company in part payment of the debt due by the State of Lahore to the British Government and of the expenses of the war. (1) III. The gem called the Koh-i-Noor, which was taken from Shah Shooja-ool-Moolk by Maharajah Runjeet Singh, shall be surrendered by the Maharajah of Lahore to the Queen of England. IV. His Highness Duleep Singh shall receive from the Honourable East India Company, for the support of himself, his relatives and the servants of the State, a pension of not less than four, and not exceeding five, lacs of Company's rupees per annum. V. His Highness shall be treated with respect and honour. He shall retain the title of Maharajah Duleep Singh Bahadoor, and he shall continue to receive during his life such portion of the above-named pension as may be allotted to himself personally, provided he shall remain obedient to the British Government and shall reside at such place as the Governor-General may select."

5. The plaintiff submits that the true intent and meaning of the fourth of the said terms set out in the fourth paragraph hereof was and is that the Maharajah Duleep Singh should himself receive from the Honourable East India Company not less than four, and not exceeding five, lacs of Company's rupees per annum, to be applied by him for the support of himself, his relatives and the servants of the State, or, alternatively, that not less than four, and not exceeding five, lacs of Company's rupees per annum should be allocated for the support of the Maharajah Duleep Singh, his relatives, and the servants of the State.

6. The plaintiff further submits that under and by virtue of the said terms the said East India Company became and was express trustee of the said sum of not less than four, and not

(1) [The second Sikh war.]

exceeding five, lacs of Company's rupees per annum for the said Maharajah Duleep Singh.

7. The plaintiff further submits that under and by virtue of the Articles of Agreement, Proclamation, and Terms respectively mentioned in the second, third, and fourth paragraphs hereof, and of the events which occurred in connection therewith, the said East India Company became and was the guardian of the said Maharajah Duleep Singh, and the said Maharajah Duleep Singh became and was the ward of the said East India Company.

8. In the year 1858, by an Act for the better government of India (21 & 22 Vict. c. 106), it was provided that the territories under the government of the East India Company should be vested in Her Majesty, and (by s. 67) that all treaties made by the said Company should be binding on Her Majesty, and all contracts, covenants, liabilities, and engagements of the said Company made, incurred, or entered into before the commencement of the said Act might be enforced by and against the Secretary of State in Council in like manner and in the same Courts as they might have been by and against the said company, if the said Act had not been passed; and further (by s. 65) that the Secretary of State in Council should and might sue and be sued as well in India as in England by the name of the Secretary of State in Council as a body corporate, and that all persons and bodies politic should and might have and take the same suits, remedies, and proceedings, legal and equitable, against the Secretary of State in Council of India as they could have done against the said Company, and the property and effects thereby vested in Her Majesty for the purposes of the government of India, or acquired for the said purposes, should be subject and liable to the same judgments and execution as they would, while vested in the said Company, have been liable to in respect of debts and liabilities lawfully contracted and incurred by the said Company; and by reason of the premises the plaintiff submits that the defendant is in the same position with reference to the Maharajah Duleep Singh and the said Prince Victor Albert Jay Duleep Singh as the said East India Company was.

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9. The Maharajah Duleep Singh died on October 22, 1893, and by his last will and testament, after certain specific devises and bequests, which do not affect the subject-matter of this action, devised and bequeathed the residue of his real and personal estate to the said Prince Victor Albert Jay Duleep Singh, and absolutely declared that he should be his heir to all his political and other rights or State rights, whether arising from treaties with Great Britain or otherwise, and inclusive of all his claim to real and personal property in India, according to the law of India.

Paragraphs 10 and 11 set forth the amounts which had been paid by the Indian Government since 1849 for the support or benefit of the Maharajah Duleep Singh and his relatives or dependants.

12. If an account be taken of the sums paid by the East India Company and by the defendant during the lifetime of the Maharajah Duleep Singh under clause 4 of the said terms mentioned in the fourth paragraph hereof, it will be found that there is a large sum due from the defendant to the Maharajah Duleep Singh.

13. On or about September 18, 1902, the plaintiff was appointed trustee of the property of the said Prince Victor Albert Jay Duleep Singh, who on or about September 25, 1902, was adjudicated bankrupt.

The plaintiff also sues the defendant as follows :—

14. The plaintiff repeats paragraphs 1, 2, 3, 4, 7, 8, 9, and 13 hereof.

15. The plaintiff submits and contends that the true effect and meaning of the terms mentioned in the fourth paragraph hereof were and are that the said pension therein mentioned did not cease on the death of the Maharajah Duleep Singh, but was hereditary, and in whole, or alternatively in part, descended to the said Prince Victor Albert Jay Duleep Singh, and that, after the death of the Maharajah Duleep Singh, the said Prince Victor Albert Jay Duleep Singh was entitled to receive the same, or part thereof, for the support of himself, his relatives, and the servants of the State, and that the East India Company were, and afterwards the defendant was, constituted trustees, and trustee,

under and by virtue of the said terms, to pay the said pension or part thereof to the said Prince Victor Albert Jay Duleep Singh.

16. As from the date of the death of the Maharajah Duleep Singh the defendant has allowed and paid to the said Prince Victor Albert Jay Duleep Singh an annuity of 8000*l.* per annum down to his adjudication in bankruptcy as aforesaid, and further on the occasion of his marriage settled a sum of 2000*l.* per annum on his wife and himself, which said sums the plaintiff is willing should be deducted from any sums found to be due to the said Prince Victor Albert Jay Duleep Singh.

The plaintiff further sues the defendant as follows:

17. The plaintiff repeats paragraphs 1, 2, 3, 8, 9, and 13 hereof.

18. Before and in the year 1849 the Maharajah Duleep Singh was possessed of and entitled to large estates, both real and personal, as his private property. The plaintiff is unable to give full particulars of the said estates, which are known only to the defendant, but, so far as he is able to ascertain, the particulars delivered herewith represent the same.

19. In or about the year 1849 the East India Company took possession of the said estates, and retained, and the defendant still retains, possession of the same.

20. The plaintiff submits and contends that the East India Company and the defendant, as guardians of the Maharajah Duleep Singh as aforesaid, held and now hold the said estates as trustees, and trustee, respectively for the Maharajah Duleep Singh and Prince Victor Albert Jay Duleep Singh under him, but the defendant will not account for the same to the plaintiff.

The plaintiff further sues the defendant as follows:—

21. The plaintiff repeats paragraphs 1, 2, 3, 4, 8, 9, and 13 hereof.

22. After the annexation of the Punjab, the Maharajah Duleep Singh was compelled under the directions of the East India Company, in accordance with article 5 of the terms set out in the fourth paragraph hereof, to reside at Futtehgurh, a town on the banks of the Ganges, in India, as ward of the East India Company, which was then his guardian. To this residence was brought some of the property of the Maharajah Duleep Singh,

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consisting of jewels, gold and silver articles, furniture, and other effects.

23. In the year 1857, the Maharajah Duleep Singh's said house was destroyed by soldiers in the employ of the East India Company, and property belonging to him, and amounting to the value of about 25,000*l.*, was converted to the use of the said Company by the said soldiers. The plaintiff is unable to give full particulars of the property, but a list of certain of the said articles so destroyed was furnished to the East India Company on November 6, 1857.

24. The plaintiff submits that the East India Company was, and that the defendant now is, liable, as trustees and trustee respectively, to account to the plaintiff for the value of the said property.

The plaintiff claims: 1. Under paragraphs 1—13 hereof: (*a*) a declaration that the defendant, as trustee as aforesaid, is liable to pay to the plaintiff, as trustee of the property of the said Prince Victor Albert Jay Duleep Singh, the arrears of the said pension accrued due during the lifetime of the said Maharajah Duleep Singh; (*b*) all necessary accounts and inquiries; (*c*) an order for payment of the said arrears to the plaintiff as trustee in bankruptcy as aforesaid. 2. Under paragraphs 14—16 hereof; (*a*) a declaration that the said pension did not cease on the death of the said Maharajah Duleep Singh, but descended in whole or in part to the said Prince Victor Albert Jay Duleep Singh, and that the defendant, as trustee as aforesaid, or otherwise, is liable to pay to the plaintiff, as trustee in bankruptcy as aforesaid, the arrears thereof accrued due after the death of the said Maharajah Duleep Singh; (*b*) all necessary accounts and inquiries; (*c*) an order for payment of the said arrears to the plaintiff, as trustee in bankruptcy as aforesaid. 3. Under paragraphs 17—19 hereof: (*a*) a declaration that the East India Company were trustees, and that the defendant is trustee, of the said estate and effects of the said Maharajah Duleep Singh, and that the defendant is liable to account therefor to the plaintiff, as trustee in bankruptcy as aforesaid; (*b*) all necessary accounts and inquiries; (*c*) that the defendant may be ordered to convey or transfer to the plaintiff, as trustee in bankruptcy as

aforesaid, so much of the said estate and effects as consists of real property, and to deliver and pay to the plaintiff, as trustee as aforesaid, so much thereof as consists of personal property. 4. Under paragraphs 21—23 hereof, that the defendant may be ordered, as trustee as aforesaid, to account to the plaintiff, as trustee in bankruptcy as aforesaid, for the value of the said property. 5. Such further and other relief as may be necessary.

It appeared from the affidavits filed, and documents therein referred to, that by a proclamation dated August 20, 1847, the East India Company announced, in substance, that it had been found necessary to exclude Her Highness the Maharanee, the mother of the Maharajah Duleep Singh, from all share in the administration of public affairs, in consequence of her intriguing to disturb the Government, and to separate her from the Maharajah, so as to make it impossible for her to instil into him feelings of hostility to the Government. In that proclamation it was stated, as alleged in the statement of claim, that the Indian Government felt the interest of a father in the education and guardianship of the Maharajah. A further account of the character and effect of this proclamation is to be found in the judgment of Stirling L.J. In a dispatch subsequently sent by the Governor-General of India to the Resident at Lahore were contained the words: "In addition to these considerations of a political nature, the Governor-General is bound to be guided by the obligation which the British Government has contracted, when it consented to be guardian of the young prince during his minority." It further appeared that the destruction of property by soldiers of the East India Company referred to in paragraph 23 of the statement of claim was by mutineers of the Bengal army at the time of the Indian Mutiny. The affidavits filed on behalf of the plaintiff alleged that the East India Company had sold private property which had belonged to the Maharajah Duleep Singh, and had received the proceeds thereof.

The defendant applied to a Master in chambers to dismiss the action on the ground that it was frivolous and vexatious, and that the statement of claim disclosed no cause of action, but the Master

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dismissed the application. On appeal Bucknill J. reversed his decision.

Rufus Isaacs, K.C., and *Willoughby Williams*, for the plaintiff. The power to dismiss an action as frivolous and vexatious, under Order xxv., r. 4, or in the exercise of the inherent jurisdiction of the Court, ought only to be exercised in a perfectly clear case. With regard to the first two heads of claim, namely, those which relate to the arrears of the pension granted to the Maharajah Duleep Singh, it is submitted that the statement of claim shews a prima facie case, either of contract or trusteeship, on the part of the East India Company, to whose responsibilities the defendant has succeeded, on which the plaintiff ought to be allowed to proceed to trial. The question as to the effect of the acts done by the East India Company, and whether and how far they were or were not acts of State, is one of fact which ought to be determined on evidence at the trial, and not summarily. It is alleged by the plaintiff that the East India Company had assumed the legal position of trustee or guardian of the infant Maharajah, and the facts as stated in the statement of claim give reasonable ground prima facie for that allegation. It is not necessary in pleading to set out the evidence by which allegations of fact will be supported. With regard to the third head of claim, namely, that which relates to the private property of the Maharajah Duleep Singh, the case is yet stronger; for it is clear that, according to Indian law, there may be a distinction between the private property of a native ruler and the property belonging to him in his State capacity: see per Lord Kingsdown in *Secretary of State in Council of India* v. *Kamachee Boye Sahaba* (1); and by the "Terms of Lahore," only the State property of the Maharajah was confiscated. It is submitted that the terms of the proclamation issued by the Indian Government and the dispatch of the Governor-General shew that the East India Company had undertaken the responsibilities of a guardian towards the infant Maharajah. It is true that the municipal Courts cannot question the validity of an act of State, but in the nature of things they must necessarily consider the effect of it. The Court

(1) 7 Moo. Ind. Ap. 476; 13 Moo. P. C. C. 22.

may not be able to question the title of the East India Company to assume the position of guardian to the Maharajah, and to take the management of his private property into their hands as such, but the Court has to consider the scope and effect of the Company's acts in so doing; and it is submitted that the question whether it did not thereby assume the legal responsibility of a guardian or trustee is at least arguable, and one which ought not to be dealt with summarily. With regard to the fourth head of claim, namely, that which relates to the property seized by the rebels at the time of the Indian Mutiny, it must be admitted that the statement of claim as at present framed does not shew any cause of action. The plaintiff seeks leave to amend that claim by adding a statement to the effect that a portion of the property was afterwards recovered, and came to the hands of the East India Company. If the other heads of claim as now stated are thought to be insufficient, the plaintiff will ask leave to amend them also.

Sir R. B. Finlay, K.C. (*Cohen, K.C.*, and *G. S. Robertson* with him), for the defendant. The general allegation that the East India Company and the defendant were trustees was no doubt inserted in the statement of claim to meet two obvious difficulties, one being that occasioned by the lapse of time since the occurrence of the matters complained of, which is far more than, in the absence of any trusteeship, would be sufficient to bar any claim, and the other being the difficulty which arises from the fact that, so far as the claim to real property is concerned, the Court in England has no jurisdiction in respect of land situated in India. It is not permissible in pleading to make a bare allegation of the existence of a legal relation, such as that of a trustee, without alleging facts to prove it: see *West Rand Central Gold Mining Co.* v. *R.* (1) and Order XIX., r. 4. The statement of claim in this case states no such facts—on the contrary, the documents therein referred to clearly shew that the acts done by the East India Company were acts of State, and were not intended to create the legal relation of trustee or guardian as between the company and the infant Maharajah; and therefore the plaintiff cannot possibly have any cause of action. With regard to the first and

(1) [1905] 2 K. B. 391, p. 399.

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second heads of claim, it is obvious on the terms of the document called the "Terms of Lahore" that the East India Company did not enter into any contract to pay the pension therein mentioned, and, even if they did, the obligation was only to continue during the lifetime of the Maharajah Duleep Singh. The Indian Government was, in the exercise of sovereign power, annexing a foreign country, and laying down for itself the terms which it would grant in so doing. Such terms might impose a moral obligation, but the notion of their constituting a legal contract or a trusteeship is quite untenable. The same considerations apply to the third head of claim and to the property therein mentioned. The circumstances under which the assumption of the custody of the infant Maharajah and the taking possession of his property by the East India Company took place, as disclosed by the documents, clearly shew that they were acts done by the Government, in the exercise of sovereign power, in consequence of political exigencies of State, and were not intended to impose the legal status of a guardian on the Company. The claim is a very stale claim, and manifestly unsubstantial, and it is submitted that under the circumstances no good purpose could be served by giving the plaintiff leave to amend. [He cited *Cook* v. *Sprigg* (1) and *Elphinstone* v. *Bedreechund.* (2)]

Cur. adv. vult.

Feb. 27. VAUGHAN WILLIAMS L.J. In this case I entirely agree with the decision of Bucknill J., which is before us as a written decision.

This is an appeal from an order of Bucknill J., dated August 11, 1905, dismissing this action on the ground that it was vexatious, and that the statement of claim disclosed no cause of action.

The action is brought upon the basis of an initial liability of the East India Company against the Secretary of State in Council of India as the successor to the liabilities of the East India Company. One of the grounds upon which it has been argued that this action is vexatious, and that the statement of claim

(1) [1899] A. C. 572. (2) (1830) 1 Knapp, P. C. C. 316, 329.

discloses no cause of action, is that on the facts therein stated all that was done by the East India Company in respect of the Maharajah Duleep Singh and his territory, and property, whether public or private, was in the nature of an act of State, and not of such a nature as to constitute a contract, or raise a trust in favour of Prince Victor Albert Jay Duleep Singh, the bankrupt, as trustee of whose property the plaintiff claims.

Before discussing in detail the various claims in the statement of claim, it is desirable to call attention to some passages in the judgment of Lord Kingsdown in *Secretary of State in Council of India* v. *Kamachee Boye Sahaba* (1), a case which in some respects was very similar to the present case. In that case Lord Kingsdown said (2): "The main point taken, and that on which their Lordships think that the case must be decided, was this, that the East India Company, as trustees for the Crown, and under certain restrictions, are empowered to act as a sovereign State in transactions with other sovereign States in India; that the Rajah of Tanjore was an independent sovereign in India; that on his death, in the year 1855, the East India Company, in the exercise of their sovereign power, thought fit, from motives of State, to seize the Raj of Tanjore and the whole of the property the subject of this suit, and did seize it accordingly; and that over an act so done, whether rightfully or wrongfully, no municipal Court has any jurisdiction. The general principle of law was not, as indeed it could not with any colour of reason be, disputed. The transactions of independent States between each other are governed by other laws than those which municipal Courts administer; such Courts have neither the means of deciding what is right, nor the power of enforcing any decision which they may make. But it was contended on the part of the respondent that this case did not fall within the principle, for the following reasons: First, because, as it was said, the East India Company did not stand in the position of an independent sovereign; that such powers of sovereignty as were exercised on behalf of the Company were vested, not in the Company, but in the Governor-General and Council, who are protected by

(1) 7 Moo. Ind. Ap. 476; 13 Moo. P. C. C. 22.
(2) 7 Moo. Ind. Ap. 476, at p. 529.

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legislative enactments for what they may do in that character: secondly, that the seizure in this case did not take place by the exercise of a sovereign power against another independent power, but was a mere succession, by an asserted legal title, to property alleged to have lapsed to the Company: and thirdly, that there is a distinction between the public and private property of the Rajah, and that the Company never intended to exercise their sovereign powers as to the latter, whatever they might do with respect to the former; that the Company, therefore, are in possession of property by the unauthorized act of their officers for which no protection can be claimed on the grounds which would protect the public property from the jurisdiction of the Court." Then Lord Kingsdown, after disposing of the other points which I have just mentioned, in favour of the Secretary of State, said (1): "The next question is, what is the real character of the act done in this case? Was it a seizure by arbitrary power, on behalf of the Crown of Great Britain, of the dominions and property of a neighbouring State, an act not affecting to justify itself on grounds of municipal law, or was it, in whole or in part, a possession taken by the Crown under colour of legal title of the property of the late Rajah of Tanjore, in trust for those who, by law, might be entitled to it on the death of the last possessor? If it were the latter, the defence set up, of course, has no foundation." Then Lord Kingsdown, after stating the difficulty of discovering from the documents put in any ground of legal right on the part of the East India Company or of the Crown of Great Britain to the possession of the Raj or any property of the Rajah on his death, says (2): "Accordingly the defendants in their answer allege that on the death of the late Rajah it was determined, as an act of State, by the defendants and the British Government, that the Raj and dignity of Rajah of Tanjore was extinct, and that the State of Tanjore had thereupon lapsed to the defendants in trust for Her Majesty: and it was thereupon also determined by the defendants, as an act of State and government, that the whole dominions and sovereignty of the State of Tanjore, together with the property belonging thereto, should be assumed by the defendants

(1) 7 Moo. Ind. Ap. 476, at p. 531. (2) Ibid. 532.

in trust for Her Majesty the Queen, and should become part of the British territories and dominions in India, in trust for Her Majesty. They then allege that the whole of the property which they have seized has been seized by virtue of their sovereign rights on behalf of Her Majesty, and insist that the Court has no jurisdiction to inquire into the circumstances of the seizure, or its justice with respect to the whole or any part of the seizure." Then Lord Kingsdown says: (1) "With respect to the property of the Rajah, whether public or private, it is clear that the Government intended to seize the whole, for the purposes which they had in view required the application of the whole," and finally (2) he thus states the result of the case: "The result, in their Lordships' opinion, is, that the property now claimed by the respondent has been seized by the British Government, acting as a sovereign power, through its delegate, the East India Company; and that the act so done, with its consequences, is an act of State over which the Supreme Court of Madras has no jurisdiction."

In the present case really the statement of claim attempts to set up a contention similar to that set up by the respondent in the case to which I have just referred, namely, that the East India Company took possession of the property, not as an act of State, but under the colour of a legal title, and, that being so, the consequences follow which would follow if the property had been seized upon by a private individual as under a legal title.

Now let me examine the present statement of claim with some little detail. It cannot be better described than it is in the written decision of Bucknill J. He says: "The statement of claim alleges four distinct causes of action, the first whereof is that the defendant as trustee is liable to pay to the plaintiff, as trustee of the bankrupt's property, arrears of a certain pension which accrued during the lifetime of Maharajah Duleep Singh, and to which Prince Victor became entitled after his death. The second alleged cause of action is that the defendant, as trustee, is liable to pay to the plaintiff arrears of the said pension due to Prince Victor Duleep Singh, in succession to Duleep Singh. The third alleged cause of action is that the

(1) Ibid. 539. (2) Ibid. 540.

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defendant is liable, as trustee, to account to the plaintiff respecting real and personal private estate of the Maharajah Duleep Singh, which the East India Company took possession of, and the defendant still holds, as guardian of the Maharajah Duleep Singh, and Prince Victor under him. And the fourth alleged cause of action is against the defendant to account, as trustee, to the plaintiff for the value of certain property, consisting of jewels and other chattels, which was seized by the soldiers in the employ of the East India Company, and was converted to the use of the Company by the soldiers."

Now it will be observed that in each one of these claims the claim is made upon the basis that the East India Company, and the Secretary of State as their successor, became trustee for the Maharajah Duleep Singh, and then for Prince Victor Albert Jay Duleep Singh. Now, it is perfectly obvious that it will not suffice in a case of this sort for the plaintiff simply to make a general statement that the East India Company became trustee. What he has to do is to set forth either documents or facts which really prima facie do establish such a trusteeship as that which he has alleged in general words throughout this statement of claim, and in each paragraph of it.

Now, with regard to the first and second parts of the claim, it is really sufficient to read the only document which deals with the origin of this claim and the nature of the right given, if any, to Maharajah Duleep Singh. That is the document of March 29, 1849, which is called the "Terms of Lahore." At the top of it is printed "Terms of Lahore," and it begins "Terms granted to the Maharajah Duleep Singh Bahadoor, on the part of the Honourable East India Company." [The Lord Justice then read the document set out in the fourth paragraph of the statement of claim.]

There does not appear to me to be the very slightest ground upon the face of this document for treating it as a contract of any kind. It is, to my mind, perfectly plain that the granting of these terms, which were granted by the East India Company to the Maharajah Duleep Singh, was an act of State over which a municipal Court has no jurisdiction whatsoever. Then, even if the document be treated as containing in the fourth clause

something in the nature of a contract or agreement, that which is given by this document is obviously something given to the Maharajah for his life only, and in respect of which, after his death, neither Prince Victor nor anybody else claiming as his heir or personal representative could have any claim whatsoever. It is a personal grant to the Maharajah for his life, and for certain purposes which absolutely ceased on his death, whether or not he had received the full amount of the four or five lacs of rupees, as the case may have been.

I will not now deal with the third claim. I propose to reserve what I have to say about that claim until the last. I propose now to deal with the fourth claim. The fourth claim, after repeating paragraphs 1, 2, 3, 4, 8, 9 and 13, proceeds as follows: "(22.) After the annexation of the Punjab the Maharajah Duleep Singh was compelled, under the directions of the East India Company, in accordance with article 5 of the terms set out in the fourth paragraph hereof, to reside at Futtehgurh, a town on the banks of the Ganges, in India, as ward of the East India Company, which was then his guardian. To this residence was brought some of the property of the Maharajah Duleep Singh, consisting of jewels, gold and silver articles, furniture, and other effects. (23.) In the year 1857 the Maharajah Duleep Singh's said house was destroyed by soldiers"—that is to say, by rebellious soldiers, soldiers in mutiny—"in the employ of the East India Company, and property belonging to him (Duleep Singh), and amounting to the value of about 25,000*l.*, was converted to the use of the said Company by the said soldiers. The plaintiff is unable to give full particulars of the said property, but a list of certain of the said articles so destroyed was furnished to the East India Company on November 6, 1857. (24.) The plaintiff submits that the East India Company was, and that the defendant now is, liable, as trustees, and trustee respectively, to account to the plaintiff for the value of the said property." So far as there is an allegation here of guardianship, the question what is the meaning of that, and what inferences are to be drawn, I will deal with, when I am dealing with claim 3; but with regard to this claim 4 one has only to read it to see that the claim is absolutely frivolous, and is not a claim which for a moment ought to be seriously considered.

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Having said this with regard to claim 4, I will now deal with claim 3. Claim 3 begins at paragraph 17, and, after repeating paragraphs 1, 2, 3, 8, 9 and 13, it proceeds as follows: "(18.) Before and in the year 1849 the Maharajah Duleep Singh was possessed of, and entitled to, large estates, both real and personal, as his private property. The plaintiff is unable to give full particulars of the said estates, which are known only to the defendant, but, so far as he has been able to ascertain, the particulars delivered herewith represent the same. (19.) In or about the year 1849 the East India Company took possession of the said estates, and retained, and the defendant still retains, possession of the same. (20.) The plaintiff submits and contends that the East India Company, and the defendant, as guardians of the Maharajah Duleep Singh, as aforesaid, held, and now hold, the said estates, as trustees and trustee respectively for the Maharajah Duleep Singh, and Prince Victor Albert Jay Duleep Singh under him, but the defendant will not account for the same to the plaintiff." There is, therefore, an allegation in paragraph 20 that the East India Company became the holders of this property which is mentioned here as trustees for the Maharajah Duleep Singh, and Prince Victor in succession to him. I shall presently have to say a word or two with regard to the time when this taking of possession is alleged to have taken place, which is now something more than fifty years ago; and, when I come to do that, I shall point out that, in dealing with the question whether an action ought to be dismissed as vexatious, the House of Lords, in the case of *Lawrance* v. *Norreys* (1), said that the length of time elapsing between the origin of the claim and the bringing of the action was a matter which ought to be taken into consideration when a judge had to deal with a question of whether or no the claim was one which ought to be dismissed, and that, in dealing with this question, one must take into consideration not only the express provisions of Order xxv., r. 4, but also the inherent power of every Court to prevent abuse of the procedure of the Court by bringing forward claims which have no reasonable possibility of success. But I should like now just to call attention to the two matters which are really relied upon by the

(1) (1890) 15 App. Cas. 210.

plaintiff here as supporting his third claim. One matter is that in the second paragraph of the "Terms of Lahore" there is found this provision, which I have already read once, namely, that "All the property of the State, of whatsoever description, and wheresoever found, shall be confiscated to the Honourable East India Company in part payment of the debt due by the State of Lahore to the British Government, and of the expenses of the war." It is said that there is a distinction drawn there between the State property and the private property, and that that entitles the plaintiff here to say that, under the provisions of these "Terms of Lahore," the East India Company, with regard to the private property, became trustees for the Maharajah and his son, or, if not trustees, became responsible in contract to account for such property. The other ground which is relied upon is the ground which appears at the commencement of the proclamation of August 20, 1847, which is an exhibit to one of the affidavits. The first paragraph of that proclamation says: "The Right Honourable the Governor-General of India, taking into consideration the friendly relations existing between the Lahore and the British Governments, and the tender age of Maharajah Duleep Singh, feels the interest of a father in the education and guardianship of the young Prince." I can only say that there is nothing, to my mind, in the "Terms of Lahore" or the preamble to the proclamation of August 20, 1847, which affords the slightest ground for saying that the East India Company accepted any trusteeship in respect of this property which is referred to in claim 3. It seems to me that under these circumstances, if the statement of claim be taken as it stands, it is impossible to discover in respect of any of these claims 1, 2, 3 and 4 that any cause of action is disclosed in this statement of claim.

It was argued by the plaintiff's counsel that, although it might be that all that appeared in the statement of claim in respect of these claims was a general allegation of trusteeship, or of a contractual relation, yet that that was sufficient, and that it would be time enough, if the action went on, to give in evidence some facts which should in some way or other support the general allegation. Now, according to my view, this contention

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must fail. In the first place, under the present system of pleading, Order XIX., r. 4, provides that "Every pleading shall contain, and contain only, a statement in a summary form of the material facts on which the party pleading relies for his claim, or defence, as the case may be, but not the evidence by which they are to be proved, and shall, when necessary, be divided into paragraphs numbered consecutively"; but really this necessity, in the case of a plaintiff making a claim, for doing something more than making a general claim, and for stating the facts upon which the general claim is based, is not a new invention under the system of pleading invented by the Judicature Act. It existed before the Judicature Act was passed, and this appears from the judgment of Lord Alverstone C.J. in the case of *West Rand Central Gold Mining Co.* v. *R.* (1) In the report of that case one finds this statement by the Lord Chief Justice: "Before dealing with the questions of law which were argued before us, we think it right to say that we must not be taken as acceding to the view that the allegations in the petition disclosed a sufficient ground for relief. The petition appears to us demurrable for the reason that it shews no obligation of a contractual nature on the part of the Transvaal Government. For all that appears in the petition the seizure might have been an act of lawless violence. The allegations that A. seized property belonging to B., and that thereupon by law an obligation arose on the part of A. to return to B. his property, or pay its value, might be truly made in respect of any wrongful seizure of A.'s property. We do not assent to the proposition of Lord Robert Cecil that it is sufficient to allege what may be a ground of action if something else be added which is not stated. Upon all sound principles of pleading it is necessary to allege what must, and not what may, be a cause of action, and, unless the obligation alleged in the present instance arose out of contract, it is clear that no petition of right could be maintained. A passage in the judgment of Willes J. in the case of *Gautret* v. *Egerton* (2) states this view so clearly that we think it well to quote it. Willes J. says: 'The argument urged on behalf of the plaintiffs, when analysed, amounts to this, that we ought to construe the general words of the declaration as describing whatever

(1) [1905] 2 K. B. 391, pp. 399, 400. (2) (1867) L. R. 2 C. P. 371.

sort of negligence the plaintiffs can prove at the trial. The authorities, however, and reason and good sense, are the other way. The plaintiff must in his declaration give the defendant notice of what his complaint is. He must recover secundum allegata et probata. What is it that a declaration of this sort should state in order to fulfil those conditions? It ought to state the facts upon which the supposed duty is founded, and the duty to the plaintiff with the breach of which the defendant is charged.'" It seems to me that, as this statement of claim stands, it is entirely deficient in those respects.

I only propose further to add that, even if it had been more arguable than in my opinion it is that this statement of claim discloses a good cause of action, it is not sufficient in a case like the present simply to rely upon the argument that there is some sort of cause of action disclosed in the statement of claim. Lord Herschell, in his speech in the House of Lords in *Lawrance* v. *Norreys* (1), said: "Where an action is thus brought, on a title which accrued more than seventy years ago, to dispossess those who, or whose predecessors, have been in possession during that length of time, it is obvious that the allegations by which it is sought to prevent the statute being a bar need to be closely scrutinized." In that case the lapse of time had been such that as to the whole claim the Statute of Limitations would have been a good answer, and it was attempted to get rid of that difficulty by an allegation of concealed fraud. What Lord Herschell was dealing with was the allegation of concealed fraud, and he said that in such a case it is not sufficient to make the allegation, but you must state the facts upon which the claim is based on affidavit, and that affidavit ought to be closely scrutinized.

I have gone through the claims in detail, and I have only to say that, according to my view, not only are the whole of the facts stated in this statement of claim consistent with that which was done by the East India Company being done as an act of State, and not in the exercise or recognition of any legal right whatsoever, but further that the facts stated upon the statement of claim are prima facie such as lead necessarily to the inference that the whole of that which was done was done by the East India

(1) 15 App. Cas. 210, at p. 213.

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Company as an act of State in respect of the personal custody of the Maharajah himself and of his property of all sorts and descriptions. I think, therefore, that the judgment of Bucknill J. was perfectly right.

It was urged by the plaintiff's counsel that, although it might be that neither in respect of the alleged trusteeship nor in respect of any allegation of a contract, express or implied, was there any sufficient statement to disclose a good cause of action, yet we ought not summarily to dismiss this claim without giving the plaintiff, as representing the interests of the creditors of Prince Victor Duleep Singh, and possibly Prince Victor himself, a chance of amendment. It was suggested to us that there might be an amendment by statements of fact which would take away the character of mere generality from the allegations in the statement of claim as they now appear, and would shew that there were facts which could be proved supporting what are now mere general statements. I agree that one would be sorry that there should not be such an opportunity of amendment, but I confess that I myself cannot conceive what those facts can be, having regard to the statements which already appear on the statement of claim. Still, although we have not been informed what sort of facts these may be, I think the plaintiff should have liberty to apply to this Court, within a limited time, for leave to amend upon production of such an affidavit as shews that there are really facts, which can probably be proved and which are prima facie proved by the affidavit, such as would support the general statements which are made in the statement of claim. Of course, any affidavit which is filed in support of this application for leave to amend will be very closely scrutinized.

STIRLING L.J. In my opinion the statement of claim discloses no cause of action, and, after the full manner in which the case has been discussed by my Lord, I can state my reasons very shortly. The first and second claims are made under a document set out in the fourth paragraph of the statement of claim, known as the "Terms of Lahore," and dated March 29, 1849. On the face of this document it records a transaction

between the East India Company, acting in the execution of sovereign powers conferred on that Company by statute, on the one hand, and the late Maharajah Duleep Singh as sovereign of the Punjab on the other. The acts of the East India Company done in the execution of such powers are acts of State, and are not subject to control by the Courts either of India or of Great Britain: see *Secretary of State in Council of India* v. *Kamachee Boye Sahaba* (1); and I may refer also to what is said by Lord Halsbury in *Cook* v. *Sprigg*. (2) The obligations arising from such acts are, as is pointed out by Tindal C.J. in *Gibson* v. *East India Co.* (3), "obligations which want the vinculum juris, although binding in moral equity and conscience," and "which the East India Company, as governors, are bound in foro conscientiæ to make good, but of which the performance is to be sought for by petition, memorial or remonstrance, not by action in a Court of law." I prefer to rest my decision on this ground, although I think that, on the construction of the document itself, the East India Company, by clause 5 of the document, reserved to itself the right to determine how much of the pension should be allotted to the Maharajah personally, so that any claim in respect of arrears is precluded by the document itself, and also that clause 4 of the document does not confer on his son and heir any right to the payment of any portion of that pension to him.

The third claim is based, in paragraph 20 of the statement of claim, on the relationship which is alleged to have existed between the late Maharajah and the East India Company as ward and guardian respectively. That relationship is stated in paragraph 7, which says that "The plaintiff further submits that, under and by virtue of the articles of agreement, proclamation, and terms respectively mentioned in the second, third, and fourth paragraphs hereof, and of the events which occurred in connection therewith, the said East India Company became and was the guardian of the said Maharajah Duleep Singh, and the said Maharajah Duleep Singh became and was the ward of the said East India Company." Now, the articles of agreement

(1) 7 Moo. Ind. Ap. 476, at p. 531.
(2) [1899] A. C. 572, at p. 578.
(3) (1839) 5 Bing. (N. C.) 262, at p. 274.

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stated in the second paragraph were really entered into between the British Government and the Lahore Durbar. In the first article it is provided that "All and every part of the Treaty of Peace between the British Government and the State of Lahore bearing date March 9, 1846, except in so far as it may be temporarily modified in respect to clause 15 of the said Treaty by this engagement, shall remain binding upon the two Governments." Then provision is made for the administration of the Punjab, and amongst other things article 7 provides that "A British force of such strength and numbers and in such positions as the Governor-General may think fit shall remain at Lahore for the protection of the Maharajah and the preservation of the peace of the country." That provision appears to me to be sufficient to shew that the document is one which is plainly an act of State. The next document which is referred to is the proclamation of August 20, 1847. I shall not repeat the preamble, but the proclamation goes on to state the reasons for the step which had been taken by the Governor-General of separating the Maharajah from his mother. They are these: That it had been found necessary to exclude Her Highness the Maharanee from all share in the administration of public affairs, that she had notwithstanding been intriguing to disturb the Government and carried her opposition so far as to impede the public business; that the Maharajah was a child and would grow up in the way he was trained; that it was probable that his mother would instil into him feelings of hostility to the chiefs, and that this could not be allowed; and then, that so long as the Maharanee occupied the Lahore Palace, strangers visited her without restriction, and every seditious intriguer who was displeased with the present order of things looked up to the Queen Mother as the head of the State, and some of them even went so far as to plan the subversion of the restored Khalsa Government. Here, again, the nature of the document and the statements it contains shew plainly that the steps which had been taken by the Governor-General of India were acts of State in their very nature. I have already spoken of the third document which is referred to in paragraph 7, namely, the "Terms of Lahore." That also is a State document. The claim is to certain private

property alleged to have been held by the East India Company as guardians of Duleep Singh. These three documents, from which the relationship of guardian and ward is said to spring, are, I think, clearly all of them acts of the East India Company done in execution of the same sovereign powers as have been already mentioned. I can find no facts stated in the statement of claim, or in the affidavits already filed, which shew that the East India Company acted in relation to the alleged guardianship otherwise than in execution of those sovereign powers; and the documents, in my opinion, shew that the assumption of the so-called guardianship was an act of State, and the obligations thence arising, like those already discussed, cannot be enforced in a Court of Law. This conclusion appears to me to be confirmed by a consideration of the results which might possibly have followed, if the other view were correct. The alleged guardianship began, and the property claimed was taken possession of by the East India Company, while the Maharajah was a minor and his character undeveloped. It was uncertain whether he would prove a friend or an enemy of the British Government. He might have attained his majority without doing anything which could be treated as an overt act of hostility, and yet have remained under great, and possibly well-founded, suspicion of entertaining unfriendly feelings towards the East India Company. Yet on his attaining twenty-one the East India Company, if the relation of guardian and ward existed in the sense in which it was contended for here, would have been liable to be sued in the Indian Courts, and compelled to hand over to him possibly large funds which he might have immediately applied for the purpose of commencing war against the British Government. I cannot suppose that a transaction of this kind was contemplated. One matter to which I may refer at this stage is a passage in the dispatch of the Governor-General of India in 1847, which was pressed upon us, particularly in answer to a question by myself, by the learned counsel for the appellant. The Governor-General says, after discussing certain other things: "In addition to these considerations of a political nature, the Governor-General is bound to be guided by the obligation which the British Government has

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contracted when it consented to be guardian of the young prince during his minority." That passage appears to me to have no bearing on the question which we have to determine. Obligations unquestionably exist which bind the East India Company and the British Government as their successors, and which ought most scrupulously to be observed, none the less that they cannot be enforced by an action. The Governor-General was writing as a statesman, and not as a lawyer. He referred to obligations which he said had been contracted, as in a true sense they had: he was pointing out most properly that they were obligations which bound and had to be performed by the British Government, but he was not dealing with the question, which alone concerns us now, whether or not they could be enforced in a Court of law.

As regards the fourth claim, it is admitted that on the statement of claim as it now stands it cannot be supported, and I need not further deal with it.

I am, therefore, of opinion that the statement of claim ought not to be allowed to stand.

The learned judge, however, has gone further and has put an end to the action. It is quite clear there is ample jurisdiction so to do, but it has always been laid down that this jurisdiction is to be exercised with great care, and only in cases where the Court is absolutely satisfied that no good can come of the action. Regard being had to the length of time which has elapsed since the events which give rise to the present claim, and to the intrinsic improbability of the East India Company having acted otherwise than in the exercise of the sovereign powers which were vested in it, I think that it is highly improbable that a case can be made out. Still, if the responsible advisers of the plaintiff can bring forward any reasonable ground for supposing that any of the acts of the East India Company were not done in execution of their sovereign powers, I think the plaintiff ought to have an opportunity of bringing it before the Court by amending the statement of claim. At the same time such leave ought not to be granted except on the terms that the proposed amendment should be verified by an affidavit which should satisfy the Court that the statements contained therein are probably well founded.

FLETCHER MOULTON L.J. read the following judgment:—This is an appeal from a decision of Bucknill J. at chambers, reversing the order of the Master, and dismissing the action as frivolous and vexatious.

Speaking broadly, the ground on which the learned judge thus dismissed the action as frivolous and vexatious is that the claims arise out of an act of State, and therefore are not cognizable by municipal Courts. In my opinion this statement of the attitude of the Courts towards acts of State goes too far, and I propose to state what I conceive to be the law on the subject.

An act of State is essentially an exercise of sovereign power, and hence cannot be challenged, controlled, or interfered with by municipal Courts. Its sanction is not that of law, but that of sovereign power, and, whatever it be, municipal Courts must accept it, as it is, without question. But it may, and often must, be part of their duty to take cognizance of it. For instance, if an act is relied upon as being an act of State, and as thus affording an answer to claims made by a subject, the Courts must decide whether it was in truth an act of State, and what was its nature and extent. An example of this is to be found in the case of *Forester* v. *Secretary of State for India in Council.* (1) But in such an inquiry the Court must confine itself to ascertaining what the act of State in fact was, and not what in its opinion it ought to have been. In like manner municipal Courts may have to consider the results of acts of State, i.e., their effects on the rights of individuals, and even of the Government itself. Acts of State are not all of one kind; their nature and consequences may differ in an infinite variety of ways, and these differences may profoundly affect the position of municipal Courts with regard to them. For instance, an act of State may fix the relations between two States, each of which continues to possess an independent existence. The consequences of such an act of State are entirely beyond the cognizance of municipal Courts, because they do not administer treaty obligations between independent States. An example of such an act of State may be found in the case of *Nabob of Carnatic* v. *East India Co.* (2) But the object and effect of an act of State are not necessarily of

(1) (1872) L. R. Ind. Ap. Supp. Vol. 10. (2) (1793) 2 Ves. 56.

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this kind. Its intention and effect may be to modify and create rights as between the Government and individuals, who are, or who are about to become, subjects of the Government. In such cases the rights accruing therefrom may have to be adjudicated upon by municipal Courts. Let me take a simple example. Let us suppose that a Government by an act of State annexes a neighbouring country, and formally takes over all the property and liabilities of the former ruler, and that a part of such property consists of debts due to him. The Government is not compelled to collect such debts vi et armis; it may avail itself of the assistance of its Courts of law for the purpose, in the same way as though the debts had accrued due to it otherwise than by an act of State. But in deciding on such a claim the Courts must loyally accept the act of State as effective. Evidence that the debt was due to the former ruler would thereby become evidence of its being due to the existing Government; and I see no reason why in such a case a claim of a converse character might not equally be entertained by municipal Courts, and a subject recover from the existing Government by the processes of law applicable to such a case any debts due from the former ruler. The judgments in the case of *Frith* v. *Reg.* (1) seem to me to give support to this view.

The true view of an act of State appears to me to be that it is a catastrophic change, constituting a new departure. Municipal law has nothing to do with the act of change by which this new departure is effected. Its duty is simply to accept the new departure; and its power and its duty to adjudicate upon, and enforce rights of individuals, or of the Government, in the future, appear to me to be precisely the same whether the origin of such rights be an act of State or not. But, although this be so, it must not be supposed that the principles of interpretation applicable to an act of State are the same as those which apply to other acts. For instance, if an act of State be expressed in a document purporting to confer benefits on an individual, it by no means necessarily follows that there is any intention to create a contract, or that the document should be construed by the same canons of interpretation as would be

(1) (1872) L. R. 7 Ex. 365.

adopted in the case of a contract between two individuals. A Government in the exercise of its sovereign power may well desire to reserve to itself discretionary powers quite inconsistent with contractual relations. There is no presumption in the case of an act of State that this is not the case, and, if the language of the document and the circumstances of the case point to such a conclusion, the Court is bound to accept it, however vague and indefinite it may make the effect of the act of State. An example of this is to be found, in my opinion, in the present case, though for other reasons it may not be necessary to decide the point.

Starting, therefore, from the premiss that the claims are not necessarily beyond the cognizance of municipal Courts merely because their origin is connected more or less directly with an act of State, I proceed to examine specifically the several heads of claim, to ascertain their nature, and to determine what it is the Court is asked to do.

The first head of claim is for a declaration that the defendant, as representing the Government of India, is trustee for the plaintiff in respect of alleged arrears of allowances payable to the Maharajah Duleep Singh under clause 4 of the "Terms of Lahore." On an examination of the language of that clause I come to the conclusion that it indicates no intention on the part of the Government to pay to the Maharajah Duleep Singh any allowance of such a character as to be capable of determination by a Court of law. It amounts (so far as the Maharajah himself is concerned) only to an assurance that an allowance, discretionary in amount, shall be made to him during his life, a promise which appears to have been faithfully kept. But, even if we assume that it was an undertaking by the Government to pay to him an allowance of a determinable amount, and that such amount was not, in fact, duly paid, the plaintiff would still fail to make out his case with regard to this head of claim. It would at most be only a breach of contract on the part of the Government. By no possible mode of interpretation can a relation of trusteeship in respect of arrears of allowance be inferred from the language of the "Terms of Lahore," and therefore this head of claim is in my opinion so utterly

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unsustainable as to render the action frivolous and vexatious, so far as it relates thereto.

The second head of claim is of a similar character, but relates to alleged arrears of a like allowance payable to Prince Victor Duleep Singh after the death of his father. This is open to all the objections which apply to the first head of claim, and in addition is open to the fatal objection that no reference can be found in the "Terms of Lahore" to any allowance otherwise than during the lifetime of the Maharajah Duleep Singh. The action, therefore, is in my opinion frivolous and vexatious, so far also as the second head of claim is concerned.

The third head of claim is of a very different character. It arises from the following circumstances. By the second clause of the "Terms of Lahore" it was provided as follows: "All the property of the State of whatsoever description and wheresoever found shall be confiscated to the Honourable East India Company in part payment of the debt due by the State of Lahore to the British Government and of the expenses of the war." Now it is alleged that, apart from the property of the State (which might and probably would be regarded as the property of its ruler, the Maharajah Duleep Singh), the Maharajah was possessed of considerable private property belonging to himself personally, and not in virtue of his being head of the State, and that such property was not, and was not intended to be, included in the phrase "property of the State" so occurring in the "Terms of Lahore," and that, consequently, such property did not pass to the East India Company under the confiscation announced by that act of State, but remained the property of the Maharajah. Pausing there, I am of opinion that whether a Court may or may not ultimately come to the conclusion that these contentions are right, they are in their nature in no wise frivolous, and the Court ought not to refuse to allow a plaintiff to raise them, if they would entitle him to relief from the Court. The judgment of Lord Kingsdown in the case of *Secretary of State in Council of India* v. *Kamachee Boye Sahaba* (1) shews that he considered that such a dual type of property might well exist in the case of the Rajah of Tanjore, and it would be only fair to give to the

(1) 7 Moo. Ind. Ap. 476; 13 Moo. P. C. C. 22.

plaintiff an opportunity of proving that such was also the case here. And, if the existence of this dual type of property in the case of the Maharajah can be established, it would give great force to the contention that the language used in clause 2 of the "Terms of Lahore" was intentionally chosen in order to limit the confiscation therein spoken of to such property as the Maharajah held in virtue of his sovereignty, so as not to include that which belonged to him in his personal capacity.

The next point to consider is whether the plaintiff can base upon the above any claim for relief. The Maharajah was eleven years old at the date of the "Terms of Lahore," and at that time, and for several years afterwards (apparently until he became twenty-one years old in 1859), he was entirely in the hands of the Company and under their tutelage. During this period, and apparently soon after the date of the "Terms of Lahore," the plaintiff alleges that the Company sold a large part of the private property of the Maharajah in addition to selling the State property, which it is common ground they were entitled to treat as belonging to them by virtue of the confiscation. The plaintiff asserts that, so far as the Company thus dealt with the private property of the Maharajah, it was on his behalf and for his benefit, and was done not by virtue of the "Terms of Lahore," but under the ample powers which they possessed as having the infant under their care and his property in their absolute control. The plaintiff does not set up a claim in tort on the ground that this was a wrongful conversion. On the contrary, he treats the action of the Company as perfectly lawful, considering the position of the parties, but claims that such action on the part of the Company did not change the beneficial interest in the property, and that the Company held the proceeds in trust for the Maharajah during his lifetime, and that therefore they now hold them in trust for the plaintiff, as trustee in bankruptcy of his residuary legatee.

Now, if the "Terms of Lahore" fully define the act of State so far as it concerns the property of the late Maharajah, I think that the above constitutes a claim of a nature such that the Court ought not to prevent the plaintiff raising it, and obtaining a decision upon it, by the ordinary process of an

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action. But I do not shut my eyes to the possibility that the defendant may meet this claim by an allegation that, apart from the question whether this property passed to the Company in accordance with the 2nd clause of the "Terms of Lahore," the seizure and sale of this property was in itself an act of State—an intentional exercise of sovereign power independent of the rights taken by the Company at the time of the granting of the "Terms of Lahore"—and that such act of State, like all acts of State, cannot be reviewed or criticized by a municipal Court. If this allegation can be substantiated, it would be an answer to the plaintiff's claim. An act of State need not rest upon or be expressed in documents. It may be evidenced by the nature of the acts done, and the circumstances under which they were done; and, if an act is in this way shewn to have been actually done in such a way as to constitute it an act of State, it is no answer to say that it was in excess of previous or contemporary acts of State to which it might be expected to conform. An excellent instance of such an independent act of State so evidenced is given by the case to which I have just referred, where the seizure of the private property of the deceased Rajah of Tanjore, by the Company, and their disregard of the claims thereon (except so far as they chose in their own absolute discretion to recognize them) was held by the Court to be in itself an act of State, though probably not coming within the act of State which annexed the territory and took possession of the State property. But in that case the Court heard and decided this as a fact and upon evidence. In the present case no such subsequent and independent act of State is as yet alleged. It will be for the defendant to allege it, and probably it will be for him to prove it, if he is in a position to do so. I can see nothing which at present justifies the Court in assuming that the Company intended to do or did any act in excess of the "Terms of Lahore." The probabilities seem to me the other way. The infant Maharajah was personally innocent of any offence. He was a mere child, and had been for years under the care of the Company, and there is no suggestion that he did anything, either previously to the "Terms of Lahore" or subsequently, against

their interests. What ground, therefore, would there be for a confiscation of his personal property not provided for by the "Terms of Lahore," which are described as being granted to the Maharajah Duleep Singh by the Government of India on behalf of the Crown, and accepted by the Council of Regency of the State of Lahore on behalf of the Maharajah? This view is strengthened by the fact that, as I have said, the allowance provided for by the "Terms of Lahore" is only during the lifetime of the Maharajah, so that the confiscation of his private property would entail his leaving his descendants without any property whatever, a most unlikely intention on the part of the Government under the circumstances. I am not forgetting that the consideration of whether such treatment of the private property of the Maharajah would have been just or unjust is utterly immaterial, if the evidence shews that it was in fact so treated by an act of State; but it is not immaterial if we are asked to assume that the occurrence of such an act of State is so irresistibly probable that the defendant ought not to be put to the proof of it, or even required to allege it in answer to the plaintiff's claim.

No doubt the form in which this head of claim appears in the statement of claim is somewhat meagre, and might be improved in the way of clearness and precision. But I think that the claim, as I have stated it, is in substance to be found there, and certainly, in reading the statement of claim in the first instance myself, before counsel had given to me the assistance of any exposition on behalf of the plaintiff, I had no difficulty in so understanding it.

If, therefore, an action in respect of this head of claim had been brought soon after the events to which it relates, I should have been of opinion that the plaintiff ought to have been allowed ex debito justitiæ to go on with his action, so far as it related thereto. But I cannot close my eyes to the fact that it is a very stale claim—more than fifty years old—and that no sufficient explanation is given for the delay. In such circumstances the Court is entitled to require of the plaintiff something more than adequate allegations; it may justly call upon him to shew, by affidavit or otherwise, that there

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is a fair possibility that these allegations are capable of proof. The extent of such requirements must depend to a certain extent upon the circumstances of the parties to the action, and upon what it is reasonable, therefore, to expect from the plaintiff, before he has had the assistance of the procedure of an action. I do not, however, intend to anticipate the decision of the Court as to the sufficiency of anything the plaintiff may bring forward to satisfy the Court in these respects. I content myself with deciding that in my opinion the plaintiff should have an opportunity of shewing that this claim is not founded on mere allegations incapable of proof, and that, if he does so, he should be allowed to go on with the action so far as regards this head of claim.

The fourth head of claim is admittedly incapable of being supported in its present form. So far as this head, therefore, is concerned the application is in substance an application for leave to amend.

I will now consider the question whether the Court ought to allow the plaintiff to amend the first and second heads of claim by deleting the allegation of trusteeship in the defendant, and to amend the fourth head of claim by confining it to such portion of the looted property as actually came into the hands of the Government. In my opinion in a case like the present the Court ought not to refuse leave to amend, if it sees a reasonable prospect, or perhaps I should rather say possibility, of the plaintiff succeeding, if the amendment is permitted, but it ought not to give leave to amend, if it is of opinion that the amendment will not prevent the action being a perfectly hopeless one. I am satisfied that this latter is the case so far as the first and second heads of claim are concerned. With regard to the fourth, I think that the plaintiff ought to be allowed an opportunity of shewing by affidavit, if he can, such facts as would justify the Court in taking the view that his claim in the amended form would be fairly arguable. If he can do this, I think his action should be allowed to proceed with regard to the fourth head, subject to such amendment being made. Otherwise the leave to amend should be refused and the action stayed with regard to that head also.

Ultimately the case was ordered to stand over with general leave to the plaintiff to apply to amend the statement of claim on the conditions mentioned in the judgments.

Order accordingly. (1)

Solicitors for plaintiff: *Smiles & Co.*

Solicitor for defendant: *Solicitor to the India Office.*

(1) The plaintiff subsequently applied for leave to make certain amendments in the statement of claim as regards the third and fourth, but not the first and second, heads of claim, upon an affidavit referring to certain documents and correspondence. The majority of the Court (Vaughan Williams L.J. and Stirling L.J.) were of opinion that the matters so brought before the Court, so far from shewing that the assumption by the East India Company of the possession of the Maharajah's private property was not an act of State, tended rather to confirm the view that it was such an act, and afforded no ground for the suggestion that the Company had ever intended to assume the legal obligations of guardian of the Maharajah or of trustee of his property. They, therefore, refused leave to amend, and dismissed the appeal. Fletcher Moulton L.J. dissented from the view of the majority, being of opinion that the documents and facts of the case did afford some ground for thinking that the East India Company, in assuming the management of the infant Maharajah's private (as distinguished from his State) property, had not done so as an act of State in such a sense as would exclude the jurisdiction of the municipal Courts to entertain the plaintiff's claims, and that, in the circumstances, the third and fourth heads of the plaintiff's claim were not, at any rate, so clearly unfounded as to be frivolous and vexatious, and, therefore, the action ought not as regards those claims to be summarily dismissed. The question involved in the subsequent application to amend was really rather a question of fact than of law turning on the special circumstances of the case, and therefore has not been thought to call for a report.

E. L.

[IN THE COURT OF APPEAL.]

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March 22, 23, 24, 27, 28; *April* 2, 3.

Oyster Ponds on Foreshore—Ancient User—Presumption of Legal Origin—Right of Occupier as against Wrong-doer—Public Health—Urban Sanitary Authority—Sewer—Discharge of Sewage into the Sea—Nuisance from Sewage—Acts of commission—Public Health Act, 1875 (38 & 39 *Vict. c.* 55), *ss.* 19, 27.

Oyster ponds or "layings" had existed as far back as living memory went upon the foreshore of an arm of the sea. The purpose for which these ponds were used was the storage of oysters, which were brought from elsewhere and laid down in the ponds in order to be fattened for the market. Certain ponds of this kind, which were enclosed by boards or concrete, were, and for more than twenty years had been, used in the manner above mentioned by the plaintiff, who had purchased them in 1879 from others who had for a period of between twenty and thirty years previously so used them. There was some evidence that the foreshore had formed part of the waste of a manor, the lord of which had a several fishery thereon.

The defendants were an urban district council which had been constituted in 1894, their district being carved out of that of a previously existing rural sanitary authority. A sewer had been made in the district by the rural sanitary authority, from which an inconsiderable quantity of sewage had been discharged into the sea near the oyster ponds. The defendants made certain new sewers, and connected them with the first-mentioned sewer, and the quantity of sewage discharged from that sewer was thereby greatly increased. The sewage so discharged caused a nuisance to the plaintiff's oyster ponds through pollution of the same with sewage to an extent which rendered them unfit for use. In an action by the plaintiff against the defendants in respect of the nuisance so caused:—

Held that, irrespectively of the question of title to the soil or to a several fishery, the plaintiff, as occupier of the oyster ponds, was entitled to maintain an action for trespass to the same by wrong-doers; that the defendants, not having any right to discharge sewage into the sea so as to cause a nuisance, and having by their acts of commission caused such a discharge of sewage, were wrong-doers; and therefore that the action was maintainable.

By Vaughan Williams L.J.: *Semble*, the plaintiff, if necessary, could make a title as owner of the oyster ponds.

By Fletcher Moulton L.J.: Under the circumstances a legal origin

ought to be presumed for the existence and user by the plaintiff of the oyster ponds.

Quaere as to the defendants' liability for a nuisance to the plaintiff's oyster ponds, if occasioned by their mere nonfeasance.

APPEAL from the judgment of Walton J. in an action tried by him without a jury.

The action was brought by the plaintiff, who carried on the business of an oyster merchant at a place called Emsworth, near Chichester, against the defendants, who were the urban district council for a district which included Emsworth, claiming damages against the defendants for a nuisance occasioned to certain oyster beds of the plaintiff through their contamination by sewage discharged from the defendants' sewers, and an injunction to restrain the defendants from a repetition of such nuisance.

The facts, so far as material to this report, were as follows (1):— It appeared that there had been oyster ponds or "layings" on the foreshore of Emsworth Creek, which forms part of Chichester Harbour, an arm of the sea, as far back as living memory went. These oyster ponds were used for the storage of oysters brought from elsewhere and laid down in the ponds for the purpose of fattening for the market. The plaintiff had in or about 1879, purchased certain oyster ponds of this kind on the foreshore from persons who had, for a period of between twenty and thirty years, previously used them as aforesaid, and he had continued so to use them for a period of more than twenty years, and down to the time of the occurrence of the matters complained of in the action. These ponds, which were high up on the foreshore, were enclosed with boards or concrete. There was evidence consisting of entries in the court rolls of a manor and other documents, which satisfied the learned judge that the foreshore, upon which these oyster ponds were situated, had formed part of the waste of a manor, the lord of which had owned a several fishery thereon, and, that being so, he found that the plaintiff had a good title to

(1) The case involved many disputed questions of fact, as to which the evidence was voluminous and the arguments lengthy. The judgments discuss the questions of fact at some length, and it has been thought sufficient for the purposes of this report only to state the facts and arguments on questions of fact so far as may be necessary to illustrate the points of law involved.

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the oyster ponds by virtue of the Statute of Limitations or otherwise.

The defendants were a local board which had been constituted in the year 1894 by an order of the county council confirmed by an order of the Local Government Board, their district being carved out of that of the Havant Union, of which the guardians of that union were the rural sanitary authority. Art. 9 of the confirming order provided that, on and after the day of the first meeting of the local board for the said local government district, i.e., the defendants' board, all the duties, liabilities, obligations, and property which were attached to or vested in the guardians of the poor of the Havant Union, acting as a rural sanitary authority, should, as regards the local district, pass to and vest in the said local board. It appeared that prior to 1872 there were not many water-closets in Emsworth, and very few connections of houses with sewers; but a certain amount of sewage from houses in Emsworth was discharged into a tidal millpond, called the Sea Side Mill Pond, which became in consequence offensive. The Havant guardians consulted an engineer named Ford, who recommended the construction of a sewer along the margin of the Sea Side Mill Pond to take the sewage which had previously found its way into that pond and discharge the same into the sea at a spot near the place where the plaintiff's oyster ponds were situated. It was proposed by Mr. Ford that a penstock should be placed at the lower end of this sewer, by means of which the sewage should be held back until a certain state of the tide, his expectation being that, upon the penstock being then opened, the sewage would all be carried by the ebb so far out to sea as to prevent a nuisance upon the foreshore. The sewer was constructed as recommended by Mr. Ford, but the arrangement as regards this penstock proved ineffective to prevent the fouling of the foreshore by sewage, and the use of the penstock was abandoned. In the opinion of the learned judge, however, the amount of sewage which found its way into Ford's sewer prior to the constitution of the defendants' board was inconsiderable; but he found that the defendants had made new sewers, and connected the same with Ford's sewer, and that the amount of sewage

discharged through that sewer was by the acts of the defendants greatly increased, and a nuisance was in consequence occasioned to the plaintiff's oyster ponds by contamination of the same with sewage to an extent which rendered them unfit for use, the result being that in 1902 persons who, at a mayoral banquet at Winchester, had eaten oysters taken therefrom were attacked by typhoid fever. It appeared that the defendants had under the provisions of the Public Health Act, 1875, required certain owners of houses in Emsworth to provide water-closets and make connections between their drains and the sewers, the number of cases in which this had been done by the defendants being, however, matter of dispute. The learned judge gave judgment for the plaintiff for damages, the amount of which was to be afterwards ascertained, but refused to grant an injunction.

Sir R. B. Finlay, K.C., and *Hohler*, for the defendants. The findings of the learned judge to the effect that the foreshore on which the oyster ponds were situated was part of the waste of a manor, and that there was a several fishery thereon belonging to the lord of the manor, were not justified by the evidence. The prima facie presumption is that the foreshore belonged to the Crown, and that there was a public right of fishing thereon; and, if so, that would go to negative any acquisition by the plaintiff of a title to the oyster beds in this case by virtue of the Statute of Limitations or otherwise. It lies on the plaintiff to rebut that presumption, which, it is submitted, he has failed to do. In depositing his oysters on the foreshore, therefore, the plaintiff was acting with no other right than any other member of the public, and cannot bring an action for an injury sustained by him merely as a member of the public. In the absence of a right to a several fishery there cannot be such a thing as a private oyster bed on the foreshore, and private property in oysters laid down on the foreshore as in the present case cannot exist; and this proposition applies even on the assumption that by grant or by virtue of the Statute of Limitations the person laying down the oysters has the ownership or lawful occupation of the soil. If a person, there being no several fishery, deposits on the foreshore oysters which belong to him, the oysters so deposited, quite

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independently of any intention on his part to abandon the property therein, become again feræ naturæ, and his property therein is divested, because his retention of property therein would be inconsistent with the public right of fishing in tidal water. The deposit of oysters on the foreshore in such circumstances cannot in point of law constitute occupation of the soil, or exclude the right of the public. Therefore, an action would not lie by the person so depositing the oysters for injury to them by the discharge of sewage upon them. In *Corporation of Truro* v. *Rowe* (1) it was laid down that no person as a member of the public can claim as a common law right to appropriate a portion of a foreshore for his own purposes, for storing his oysters, to the exclusion of the rest of the public, or claim to be entitled to oysters as long as they are deposited on the foreshore. [They cited also on this point *Mayor of Maldon* v. *Woolvet* (2); *Mayor of Colchester* v. *Brooke* (3); *Neill* v. *Duke of Devonshire* (4); *Duke of Somerset* v. *Fogwell* (5); *Attorney-General* v. *Emerson* (6); *Hastings Corporation* v. *Ivall* (7); *State* v. *Taylor* (8); *Fleet* v. *Hegeman.* (9)]

But, assuming that the plaintiff could make a title to these oyster beds, even so the action is not maintainable. An action will not lie in such a case against a public body like the defendants for mere nonfeasance: *Gibson* v. *Mayor, &c., of Preston* (10); *Sanitary Commissioners of Gibraltar* v. *Orfila* (11); *Cowley* v. *Newmarket Local Board* (12); and it is submitted that the learned judge was wrong in finding, as the result of the evidence, that it was by misfeasance of the defendants that the mischief was occasioned. It has been held that an action will not lie against a sanitary authority merely by reason of the use of the sewers vested in them by the inhabitants of the district: *Attorney-General* v. *Guardians of Dorking.* (13) Moreover, in the present case there was evidence of a right by ancient prescription or custom, or by lost grant,

(1) [1902] 2 K. B. 709, at p. 715.
(2) (1840) 12 A. & E. 13.
(3) (1845) 7 Q. B. 339.
(4) (1882) 8 App. Cas. 135.
(5) (1826) 5 B. & C. 875.
(6) [1891] A. C. 649.
(7) (1874) L. R. 19 Eq. 558.
(8) (1858) 3 Dutch. (27 N. J. L.) 117.
(9) (1835) 14 Wend. (N. Y.) 42.
(10) (1870) L. R. 5 Q. B. 218.
(11) (1890) 15 App. Cas. 400.
(12) [1892] A. C. 345.
(13) (1881-2) 20 Ch. D. 595.

in the inhabitants of Emsworth to send their drainage into the sea, which right existed before the existence of the authority which was the defendants' predecessor, and that right would cover the increased flow of sewage by reason of the natural growth of the place; and, even if that were not so, the householders of the district were entitled to have their houses connected with the sewers under the Public Health Acts, and the defendants had no power to prevent their using the sewers: *Ainley* v. *Kirkheaton Local Board.* (1) The substance of the complaint in this action is really that the defendants have not provided such a new system of sewerage for their district as would obviate the mischief occasioned to the plaintiff. It is clear upon the authorities that no action will lie in respect of any default of that kind by the local authority, the remedy for such a default being by application to the Local Government Board under s. 299 of the Public Health Act, 1875: *Glossop* v. *Heston and Isleworth Local Board* (2); *Attorney-General* v. *Guardians of Dorking* (3); *Harrington, Earl of* v. *Derby Corporation* (4); *Attorney-General* v. *Clerkenwell Vestry* (5); *Brown* v. *Dunstable Corporation.* (6)

Assuming that the defendants would be liable by virtue of art. 9 of the confirming order for acts of misfeasance by their predecessors, the rural sanitary authority, it is submitted that the effect of the evidence is to shew that the sewer made by that authority was really an improvement on the previous state of things, and did not increase any evil that already existed. The matters which were relied on as misfeasance by the defendants themselves were of a trivial character, and in the nature of an afterthought. It is submitted that, upon the evidence, it was not shewn that they really enhanced substantially the effects of the discharge of sewage from Ford's sewer. The number of cases in which the defendants had given notice to householders to make water-closets and connect their drains with the sewers was very small, and could not substantially affect the quantity of sewage discharged.

It is further submitted that discharging sewage into the sea is

(1) (1891) 60 L. J. (Ch.) 734.
(2) (1878-79) 12 Ch. D 102.
(3) 20 Ch. D. 595.
(4) [1905] 1 Ch. 205.
(5) [1891] 3 Ch. 527.
(6) [1899] 2 Ch. 378.

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not at common law a derogation from any one's rights, so far as mere pollution of the sea water is concerned, apart from any nuisance from effluvia, or the pollution of the air lying over the land, or any casting of obnoxious materials on the land which may therefrom result. There was no evidence really in this case of any substantial nuisance to the foreshore or damage to the oysters, apart from the access of impure sea water to them. There is no authority to shew that a riparian proprietor is entitled to have the water of the sea flow in its natural state on his land. The case is not analogous to that of a riparian proprietor of land on the bank of a river, where the maxim "Aqua currit et debet currere" applies. There is no statute forbidding the discharge of sewage into the sea, but, on the contrary, the Public Health Act, 1848 (11 & 12 Vict. c. 63), s. 49, recognized the sea as a means for the disposal of sewage. The Public Health Act, 1875, s. 17, requires sewage to be purified before being discharged into streams or other fresh waters, but does not mention the sea. The terms of the Rivers Pollution Prevention Act, 1876 (39 & 40 Vict. c. 75), s. 20, are strong to shew that, except to the extent to which any order of the Local Government Board may otherwise determine, sewage may be discharged into the sea. The plaintiff, having voluntarily laid down his oysters where he knew sewage was being discharged, cannot recover damages for any injury caused to them by the sewage, for such damage is not the natural result of the defendants' action. [They also cited *Attorney-General* v. *Birmingham Drainage Board* (1); *Robinson* v. *Workington Corporation*. (2)]

Macmorran, K.C., and *W. Wills* (*J. G. Pease* with them), for the plaintiff. The learned judge was right in finding upon the evidence that the foreshore on which were these oyster ponds had formed part of the waste of a manor, and that the lord of the manor had a several fishery thereon, the result being that the plaintiff could and did possess a good title, as owner of the oyster ponds, by virtue of the Statute of Limitations. But, apart from proof of any title, the de facto occupation of the oyster ponds, which he undoubtedly had for more than twenty years, is sufficient to entitle him to maintain an action against wrong-doers

(1) (1881) 17 Ch. D. 685. (2) [1897] 1 Q. B. 619.

trespassing thereon. Where there has been ancient user a lawful origin, if possible, of that user must be presumed. If there was a several fishery, the lord of the manor might grant a portion of the foreshore for the storage of oysters, or license a person to use it for that purpose. It is impossible, however, to contend that there cannot be private oyster beds on a foreshore in the absence of proof of a several fishery, in the face of a series of statutory enactments, which obviously imply that such private oyster beds may exist, and make the theft of oysters therefrom larceny: see, among others, 48 Geo. 3, c. 144; 5 & 6 Vict. c 106, s. 11; 8 & 9 Vict. c 108, ss. 16, 17; 24 & 25 Vict. c. 96, s. 26. It has been held that, in proceedings against a wrong-doer, proof of actual possession of a franchise by acts of user is sufficient: *Paley* v. *Birch* (1); *Reg.* v. *Downing.* (2) The case of *Corporation of Truro* v. *Rowe* (3) has really no bearing on the present case. There the corporation were lessees of the foreshore, and all that was decided was that the defendant, merely as a member of the public exercising the public right of fishery, had no right to appropriate a portion of the foreshore for the storage of his oysters as incidental to the public right of fishery. It was not in that case a question of the right of a person in de facto exclusive possession of a portion of the foreshore to maintain an action against wrong-doers such as arises here. [They also cited on this point *Malcolmson* v. *O'Dea* (4); *Rex* v. *Joliffe* (5); *Young* v. *Hichens.* (6)]

The defendants were, as regards the plaintiff, in the position of trespassers on his oyster ponds on the principle laid down in *Fletcher* v. *Rylands.* (7) The learned judge was right in finding that the defendants had, by making new sewers, and by compelling householders to connect their drains with the sewers, largely increased the amount of sewage discharged, which before their time he finds to have been inconsiderable. They were therefore guilty of more than mere nonfeasance.

It was not established that there was any prescriptive right in

(1) (1867) 8 B. & S. 336.
(2) (1870) 11 Cox, C. C. 580.
(3) [1902] 2 K. B. 709.
(4) (1863) 10 H. L. C. 593.
(5) (1823) 2 B. & C. 54.
(6) (1844) 6 Q. B. 606.
(7) (1866) L. R. 1 Ex. 265; (1868) L. R. 3 H. L 330.

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the inhabitants of Emsworth to discharge their sewage into the Emsworth creek: see *Attorney-General* v. *Luton Local Board* (1), *Jenkins* v. *Harvey* (2), *Metropolitan Board of Works* v. *London and North Western Ry. Co.* (3), and *Attorney-General* v. *Acton Local Board.* (4) A prescription of this kind would depend on the presumption of a lost grant, and a grant to do what is unlawful cannot be presumed: see *Neaverson* v. *Peterborough Rural Council.* (5) By the Public Health Act, 1848 (11 & 12 Vict. c. 63), s. 46, it was, and by the Public Health Act, 1875, ss. 19, 27, it is, unlawful for the local authority to keep their sewers or to make arrangements for the disposal of their sewage so as to create a nuisance. As long as the discharge of sewage into Emsworth creek created no appreciable nuisance to the plaintiff's oyster beds—that is to say, until the quantity of sewage discharged was increased by the action of the defendants so as to be a nuisance—no action could be maintained, and therefore no presumption of a prescriptive right could arise. The learned judge finds that the user of the sewer after 1894 was altogether different in character from what it had been before. There is no authority for the proposition that there is either a common law or a statutory right to discharge sewage into the sea so as to cause a nuisance through pollution of the sea water. The discharge of sewage into the sea by the predecessors of the defendants was unlawful, and by art. 9 of the confirming order they have succeeded to their predecessors' liabilities.

The decision in cases like *Gibson* v. *Mayor of Preston* (6) depended on the fact that the body sued were merely placed in the position of surveyor of highways, who represented the inhabitants of the district, and could not be sued for mere nonfeasance: see *Young* v. *Davis* (7) and *McKinnon* v. *Penson.* (8) The authorities do not shew that a sanitary authority cannot be sued by a person who has suffered special damage through their nonfeasance or neglect of duties expressly imposed upon them by the sanitary Acts in respect of

(1) (1856) 2 Jur. (N.S.) 180.
(2) (1835) 1 C. M. & R. 877.
(3) (1881) 17 Ch. D. 246.
(4) (1882) 22 Ch. D. 221.
(5) [1902] 1 Ch. 557.
(6) L. R. 5 Q. B. 218.
(7) (1862) 7 H. & N. 760; (1863) 2 H. & C. 197.
(8) (1854) 9 Exch. 609.

sewers. The cases in the Chancery Division which have been relied on for the defendants were cases in which the action was, in substance, brought for a mandatory injunction to compel the defendants to establish a new system of sewerage in their districts, a class of case which depends upon altogether different considerations from those applicable to the present. [They also cited on this point *Sydney Municipal Council* v. *Bourke* (1); *Baron* v. *Portslade Urban District Council* (2); *Attorney-General* v. *Birmingham Borough Council* (3); *White* v. *Hindley Local Board* (4); *Wilson* v. *Halifax Corporation*. (5)]

Sir R. B. Finlay, K.C., in reply. *Règ.* v. *Downing* (6) shews that it is necessary to prove the existence of a several fishery in order to establish a private right to oyster beds on the foreshore.

Cur. adv. vult.

April 3. VAUGHAN WILLIAMS L.J. This is an appeal against a judgment of Walton J., who gave judgment for damages, which are to be ascertained hereafter, in favour of the plaintiff. The plaintiff in this action is an oyster merchant, who for many years has carried on his business at Emsworth on a large scale, and has used for the purpose of that business certain oyster beds. He brings this action against the urban district council of Warblington, the defendants, to recover damages for injuries which he alleges that he has sustained by their acts with regard to his oysters and oyster beds, and his business as an oyster merchant. The cause of the damage as alleged is that the defendants have discharged near and on the oyster beds of the plaintiff sewage to such an extent as to render the oysters unfit for human consumption; and unfortunately, as we know, there is no doubt that the oysters were contaminated by the discharge of sewage, and some of these oysters were afterwards eaten at a banquet at Winchester with most lamentable results.

The points that are raised in this case may, I think, be summarized in this way. First, it is said that the plaintiff had no such property or interest in the beds or ponds where he

(1) [1895] A. C. 433.
(2) [1900] 2 Q. B. 588.
(3) (1858) 4 K. & J. 528.
(4) (1875) L. R. 10 Q. B. 219.
(5) (1868) L. R. 3 Ex. 114.
(6) 11 Cox, C. C. 580.

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deposited his oysters as to give him any right of action against the defendants. The next question that is raised is this: it is said that, even assuming that the plaintiff had such a right or interest by way of occupation or property in these oyster beds as would enable him to maintain the action, yet, regard being had to the history of the establishment and constitution of the defendant board, the defendants are in the circumstances of this case under no liability in respect of this sewage having contaminated these oysters. Then, besides that point, there was raised a defence based really either upon a common law right to discharge sewage into the sea, or a prescriptive right vested in this body to discharge sewage into the sea adjoining Emsworth.

Now, I shall deal with these points one by one, and I propose in my judgment to go through the judgment and findings in fact and in law of Walton J., and to express my views as to how far those findings can be justified.

Now, the first thing that the learned judge finds is that the soil of the foreshore in this case belonged to the lord of the manor; I think that that finding in fact is right. The fact that the soil of this foreshore belonged to the lord of the manor, being in fact waste of the manor, of course is not per se sufficient to support any right in the plaintiff, because, as the learned judge points out, assuming the soil to have been the soil of the lord of the manor, it does not give any property or title to the plaintiff, unless he can shew that by grant, or by the Statute of Limitations, or in some other way, he has established a right of some kind to the soil upon which the oyster beds or oyster ponds are situated. A question will also arise in a case like the present as to what rights of fishery there are in the locus in quo, and Walton J. properly, in my judgment, points out that, if there is not a right of several fishery in the lord, the right of the public to fish on the foreshore will have to be taken into consideration. But I agree there again with the learned judge that this would not prevent acquisition of part of the fishery by possession under the Statute of Limitations, provided the soil of the foreshore were vested in the lord of the manor. The learned judge has described the character of these ponds, and how they are constructed and distinctly marked out, and

there does not seem to be any dispute of fact as to that part of the case. Now the manner in which the plaintiff used these oyster beds was as follows. He dredged oysters at a distance from Emsworth in deep water, and brought them in and deposited them in these beds, and he also, I think, imported oysters, and dealt with them in the same way. The oysters were put down in the ponds to be fattened. They at some time, at all events, were chattel oysters, and were owned as such by the plaintiff, and, that being so, they were deposited in these beds or ponds as I have described.

Then one has to consider, these oysters being in these beds, and being injured in this way, whether the plaintiff has a good cause of action against the defendants, and in this action it is necessary, I think, for him to prove at the least an occupation of these beds. Walton J. has gone through documentary evidence of various sorts, the presentments of manor courts, and a number of other matters of that kind, and he arrived at the conclusion that, not only had the lord of the manor got the soil of the foreshore vested in him, but also that he had a several fishery on the foreshore at this point, that is, this part of the foreshore which was within the ambit of his manor. The importance of the existence of a several fishery for the purposes of this case, on the assumption of fact which I have adopted, is this, namely, that one would be thereby freed from any difficulty which might arise from the existence of a public right of fishing. In my judgment, if it were necessary for the plaintiff to prove title to these beds, he would, under these circumstances, be able to prove a title. The circumstances to which I refer when I say that are these: that the soil at this point belongs to the lord of the manor, and it seems to me that, having regard to the length of time during which there has been occupation of these beds or ponds by the plaintiff and his predecessors, if it were necessary to prove title, it could be proved. But, even if title could not be proved, in my judgment there has been such an occupation of these beds for such a length of time—not that the length of time is really material for this purpose—as would entitle the plaintiff as against the defendants, who have no interest in the foreshore, to sustain this action for the injury which it is alleged

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has been done by the sewage to his oysters so kept in those beds.

Now, the next question will be that of the liability of the local board, and for this purpose one has to go a little into the history of the establishment of this board and its constitution. The defendants' board was established in 1894. Their predecessors in respect of the district for which they were appointed had been the rural sanitary authority for the Havant Union, their district being one which was carved out of the former district of Havant. It is to be noted that art. 9 of the order by which the defendants' board was established provides: "That on and after the day of the first meeting of the local board for the said local government district"—that is, the defendant board's district—"all the duties, liabilities, obligations, and property which are attached to or vested in the guardians of the poor of the Havant Union, acting as a rural sanitary authority, shall, so far as regards the local district, pass to and vest in the said local board." When one has to consider the question of the liability of the defendants, not only the question of their liability for their own acts, but also that of their liability for the acts of their predecessors, it might become important under some circumstances to consider the meaning of that art. 9, the obligation of which is not disputed on either side.

Now, the history of these sewers is of this kind. I am not going to read long quotations from the judgment of Walton J., but I am basing this history upon the facts which he has found in his judgment. The town of Emsworth is not one in which the population has increased very largely as time went on. There was a time when undoubtedly the disposition of the sewage in Emsworth, so far as the houses of householders were concerned, was very largely effected by means of privies and cesspits, and the use of water-closets was very little adopted. But, in so far as there was sewage carried away by drains, it was carried away, at all events upon the west side of Emsworth, that is the side which abuts on what is called the Sea Side Mill Pond, by sewers which mainly discharged into that pond, which was a tidal mill pond; and there came a time during the period when

the district formed part of the district of the Havant Rural Sanitary Authority at which, in consequence of such discharge as there was of sewage into the Sea Side Mill Pond, it came to be very, or at all events somewhat, offensive. The Havant District Council were minded to cure this evil, if they could, and consulted a Mr. Ford, an eminent engineer versed in these matters, who recommended that a sewer should be carried along the border of this Sea Side Mill Pond, and that in this way the sewage should be kept out of that pond, and discharged at some flood-gates near a place which I think was called the Quay. The object of Mr. Ford's sewer was this, to prevent the water of the Sea Side Mill Pond from being polluted, and, that being the object, he points out in his report in some detail how he proposes to bring about this result without fouling the foreshore, and any oyster beds that might be on it, with the sewage that might then be cast on that part of the foreshore. It is plain from the description—I need not read it at length—which is given by Mr. Ford in his report which was put in evidence, that he only hoped to effect this result by means of a penstock, which was to be placed at the lower end of this sewer close to the point marked "flood-gate" upon the map which I have in my hand. Now, for some reason or other, this plan of Mr. Ford's was not successful. I do not know why, but I think it is common ground that at a date certainly as early as 1892 the use of the penstock, by which Mr. Ford expected to be able to free the Sea Side Mill Pond from foul matter, without bringing about any fouling of the foreshore, was found to be ineffective, and that led to the abandonment of its use. Shortly, what was expected of it was this, that the sewage in what was called Ford's sewer should be held back for some nineteen hours out of the twenty-four, and that then it should be let loose at such a time before low water as that the water still remaining to run down should, on the ebbing tide, carry the sewage so far out into the sea as to render it innocuous. But, as matters turned out, the penstock did not produce this result, and of course that fouling of the foreshore, which it was intended by Mr. Ford's scheme to prevent, took place. According to the findings of the learned judge, however, the amount of sewage coming down,

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especially of solid sewage, in those earlier years was comparatively small. What Walton J. says about this is as follows: "In my opinion, at that time there were, as I think appears from the evidence, very few, if any, water-closets in Emsworth. There were very few connections from privies or cesspits with drains, and I think that the amount of sewage which found its way into Mr. Ford's sewer, which was made, as I have said, about 1874, at first was inconsiderable. The defendants after they were constituted, that is, the urban district council, made additions to that sewer, and made some considerable increase by their acts and orders in the amount of sewage matter which was discharged by the sewer. I think that the defendants are responsible for the sewer practically, at any rate so far as the purposes of this case are concerned, as if they themselves had made it." I agree with him in that conclusion. We have not therefore, in my opinion, here to consider, at all events to decide, whether or not the defendants in this case would be liable in this action if they had not actively brought about this result which has occurred. I mean by "actively" by their own acts, as distinguished from any omission on their part to perform their duty in this respect. I agree with Walton J. that it is plain on the evidence that these defendants themselves altered altogether the working and operation of the sewer called Ford's sewer, because they made themselves new sewers, and these new sewers which they made were connected with Ford's sewer, and largely increased the amount of sewage which was introduced into it. As one example of a new sewer of that sort, at a point to the north, a considerable distance from the sea, where there had been for a long time in existence a common cesspit, namely, at a point between the places called Northlands and Coldharbour on the New Brighton Road, or close to it, they made a new sewer which introduced sewage from that part of Havant into Ford's sewer where it had not previously come. They also made a sewer on the bank which lies to the north of the plaintiff's oyster beds. That sewer primarily may have been in one sense a benefit to the oyster beds, because up to that time there had been two or three sewers which directly discharged into the midst of the oyster beds, and the result of this "pick-up sewer," as it

was called, was to carry what used to come through those sewers down into the midst of the oyster beds into Ford's sewer which I have been speaking of. But it must not be forgotten that, although to that extent there may have been an amelioration of the condition of the oyster beds, it was by no means the only sewer which was made by the defendants which carried additional sewage into Ford's sewer which discharged in the way I have described. Now, under those circumstances, it seems to me that there is ample evidence that the defendants have brought about the result complained of by their own acts as distinguished from any omission of duty on their part, and it is unnecessary, therefore, to decide anything positively as to how far the defendants would be liable for acts of omission to perform their duty as distinguished from acts of commission causing the injury complained of. I think that there is sufficient evidence here, and I gather that Walton J. thought so also, of acts of commission by these defendants. We have heard a good deal about the increase in the number of water-closets. That the number of water-closets was very much increased is certainly true. It is said, if once you have got a public sewer, that the householders would be entitled to discharge the sewage from their houses into this common sewer. I agree that that is so. It is said that the increase in the number of water-closets was caused more or less by the orders of the defendants. Well, certainly it was, more or less; but I do not think that my decision as to the defendants having brought about the result complained of by their own acts would be at all altered, even if it were proved that it was only to a small extent that they actually ordered these water-closets. They themselves seem to have been alive to the danger which would accrue from the introduction of the sewage into this sewer, because they tried, not, I think, with any signal success, a system of catch pits which would prevent the solid sewage being carried into the sewer. As I have said, the conclusion of fact at which I have arrived relieves me from considering the question whether, if the defendants here had not been guilty of such acts of commission leading to the damage complained of as to make them liable, and if what had been proved against them

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had been simply the omission to perform their duty in respect of the sewering of this town, they would have been liable or not, because there is, in my opinion, evidence that the injury done was brought about by acts of commission done by the defendants' board. But also I am relieved in this state of circumstances from the necessity of deciding what is the effect of art. 9 of the order to which I have alluded, and as to whether that would make the defendants liable for the bad works, the ineffective works, that have been laid down by their predecessors. I do not, however, wish to suggest that the decision of Walton J. as to the effect of art. 9 is in any way wrong or could be called into question.

Now, if one comes to the conclusion that the defendants are prima facie responsible for the damage done by their sewers to the plaintiff's oyster beds, one has to consider whether there is any ground on which they can escape this liability. They attempt to do so by saying that they have a prescriptive right to discharge this sewage in the way they have done. I do not agree with that suggestion. If the case had been merely that, there being a prescriptive right to discharge sewage on to this foreshore, all that had happened had been that the quantity of sewage had increased through the inhabitants of Emsworth using these sewers to a larger extent than they had done before, in the exercise of their right to connect with the sewers, I might not have said that that increase in the quantity carried down the sewer was an increased user of the right enjoyed by prescription to such an extent as to prevent reliance on the prescription; but, as the matter stands, really the user during the last ten years has been altogether different in character as well as quantity from the user of the preceding years. I wish to say with regard to prescription, although I need not go into it in any detail, that of course this is not a case in which a prescription would arise under the Prescription Act. If the prescription could arise at all, it must be either by common law prescription based upon an assumed grant (and I have great doubt whether that would apply to a case like the present, which is merely that of a claim for a prescription in gross) or it must have been a prescription based upon immemorial user;

but in my opinion the claim to prescription in this case fails altogether.

There was mention made in the course of the argument of a common law right to discharge sewage in this way into the sea, but I am of opinion that there is no such common law right, and I may say in passing that this view is one that has already been expressed by Buckley J. in his judgment in *Hobart* v. *Southend Corporation* (1), to which I will refer hereafter.

Now, the outcome of what I have said at present is this, that in my judgment the plaintiff has a sufficient occupation—and I am inclined to think also property, but occupation is sufficient—to entitle him to bring this action. I am of opinion that under the circumstances stated the defendants have actively brought about the injury which is complained of, and I am also of opinion that the defendants have not succeeded in establishing any prescriptive right, or any common law right, which is inconsistent with the plaintiff's case.

Although this is my conclusion in this case, it is right that I should say a word or two about some cases which are supposed to militate against the decision of Walton J. and to stand in my way in delivering the judgment which I have delivered.

I will take first the case of *Truro Corporation* v. *Rowe* (2), and I may say shortly that I do not think that case has any application to the present case. There the corporation had obtained a lease of the foreshore, and the defendant, who was a fisherman, by his defence originally claimed a title to keep his oysters in certain oyster beds—(1.) by virtue of a several fishery, (2.) by virtue of local custom, and (3.) by virtue of his possession of the ground. But, as the case went on, the defendant really either abandoned those defences altogether or, in so far as he did not abandon them, they were decided against him by the findings of the jury. The case which was ultimately set up by the defendant was that he was entitled as a member of the public to fish for oysters on the foreshore; and he said that fishing is a complex operation and consists not only of dredging for the oysters and thus picking them up, but also in the depositing

(1) (1906) 75 L. J. (K.B.) 305. (2) [1902] 2 K. B. 709.

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of these oysters for the purpose of bringing them into a state fit to go into the market. He described all that as being a part of the operation of fishing, and that really was the only defence which was ultimately relied upon by the defendant. Now, that being so, the findings of the jury were, first, that the acts done did not constitute an actual occupation of the soil, but were only incidental to the fishing for the oysters—as regards which I may say that in this case the separation of the beds from the rest of the foreshore seems to have been of the slightest character; secondly, that oyster fishing could not be practically carried on without what is called storage, and Wills J., who tried the case, took that view, but on appeal the Court of Appeal did not agree with him. Cozens-Hardy L.J. delivered the judgment of the Court, and, after going through the evidence in respect of the matters that the defendant abandoned or was defeated in respect of, he says: "But the judge was asked to accept, and apparently accepted, the statements of the defendant's counsel in preference to the uncontradicted evidence, and we have been urged to hold that the defendant only deposits the oysters on the foreshore as an incident of fishing, and that, in short, he is only putting the oysters into the water where anyone may get them. We cannot adopt this view. It makes the action a mere farce. It seems to us plain that the parties intended to try, and did try, the important question whether the defendant has a right to appropriate a section of the foreshore for his own purposes, for storing his own oysters, to the exclusion of the rest of the public. In our opinion such a claim cannot be supported as a common law right. No authority has been produced in favour of it. Unless interrupted, the defendant might acquire a title against the plaintiffs." Having arrived at that conclusion the Court made this declaration: "Declare that the defendant in common with the rest of His Majesty's subjects is entitled to enter on the hereditaments demised by the indenture of lease in the statement of claim mentioned and on every part thereof for the purpose of fishing for and taking and carrying away oysters and other shell fish, and also for the purpose of depositing oysters and other shell fish thereon, but is not entitled to the exclusive occupation of any part of the said hereditaments,

and is not entitled to any such oysters or other shell fish so long as the same shall continue so deposited." Now, that conclusion was arrived at after a trial in which the jury found that the acts done did not constitute an actual occupation of the soil, but were only incidental to the fishing for oysters. It seems to me that that finding does not affect the present case. Here it is found by the judge, who for this purpose was acting as a jury, that the acts done by the plaintiff did constitute an actual occupation of the soil, and were not only incidental to the fishing for oysters; and it must also be remembered that in this case the learned judge finds as a fact that the soil was the soil of the lord of the manor, and of course, if the lord of the manor has the soil, prima facie he may grant rights, including rights of occupation; and, if the evidence is such that one ought to find that the plaintiff was in occupation, and also that the lord of the manor had the several fishery, the result, in my judgment, will be that *Truro Corporation* v. *Rowe* (1) has no application to this case whatever. Now, the next case which is said to be fatal to the judgment of Walton J. is the case of *Reg.* v. *Downing*. (2) The marginal note in that case is this: "Larceny—Oyster bed in a tidal river—Proof of separate fishery. In support of an indictment for stealing oysters in a tidal river, it is sufficient to prove ownership by oral evidence, as, e.g., that the prosecutor and his father, for forty-five years since 1815, had exercised the exclusive right of oyster fishing in the locus in quo, and that in 1846 an action had been brought to try the right and the verdict given in favour of the prosecutor." The evidence in that case really divided itself into two parts. One of the witnesses said: "I have, with my father, exercised the exclusive right of oyster fishing over these rights for fifty-five years, since 1815. I pay rates for the fishing. The prisoner was in my employ, and worked on these fisheries in the lower rights. I hold the exclusive right of oyster fishing." That is one way in which he puts his claim, and possibly he meant by that that he had a right of several fishery, but it does not seem to me that he necessarily had one at all. In another part of his evidence he places reliance upon the oyster beds, and says that people were

(1) [1902] 2 K. B. 709. (2) 11 Cox, C. C. 580.

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not allowed to go on the oyster beds, and he goes to the length of saying that vessels had to ground on the sand in the lower rights. So that I am not certain, as far as that evidence is concerned, whether the claim was based upon a several fishery or upon a private oyster bed or oyster beds. Cockburn C.J., in delivering the judgment, said: "This case is free from any doubt. The prisoner was caught stealing oysters from an oyster bed, by his own acknowledgment. At the trial the prosecutor proved by oral evidence that from the year 1815 to the present time he and his father had been in the possession and enjoyment of the oyster bed, and had asserted an exclusive right thereto; that their exclusive right to this oyster bed was challenged, and that in 1846 an action was brought to try the right, and a verdict given in favour of the prosecutor, and that since then, down to this time, the prosecutor's right had not been challenged. It was said that this evidence was not sufficient, and that the prosecutor's right ought to have been proved by deed. It is quite true that this oyster bed was in a navigable river, where the public had prima facie a right to fish; but it is equally true that by ancient grant or prescription a private person may have an exclusive right to a separate fishery therein. Then the only question is, can such an exclusive right be proved by parol?" Now, it is said that the effect of that decision is that it is essential, in order to support a prosecution of that sort, that the prosecutor should prove that he has a right of several fishery. I, myself, should hesitate very much to draw that conclusion from the evidence or from the words of the judgment of Cockburn C.J. It seems to me that really reliance was placed upon the exclusive right of the prosecutor to the oyster bed. Be that how it may, it seems to me that in a case like the present, where the lord of the manor had the several fishery, it is quite plain that the plaintiff may by prescription or grant make a title as against all the world. Under those circumstances there is nothing at all to prevent the plaintiff from not only acquiring a right to use these beds, but being also within the words "private oyster beds," which words are used again and again in a series of enactments for the protection not only of several fisheries, but, to my mind, of private oyster beds.

I mean that series of enactments, which, so far as has been quoted before us, began in the reign of George III. and culminated in ss. 51 et seq. of the Sea Fisheries Act, 1868. I do not think myself that this case of *Reg.* v. *Downing* (1) at all conflicts with the judgment of Walton J.

I wish to say, without making my judgment much longer, a few words about two cases which were much relied upon by the defendants' counsel. One is the case of *Glossop* v. *Heston and Isleworth Local Board.* (2) Really, if that case is looked at, it will be seen that the action was brought in substance for a mandatory injunction to compel the defendant board to carry out their statutory duty by providing a proper system of sewerage. It was said that that action could not be properly brought against them, that the plaintiff was claiming an impossible remedy, and claiming a remedy in the wrong Court. As I have said, it is quite true that in that particular case it was held that the action for damages would not lie, but I see nothing from the beginning to the end of the judgment which in any way shews that the present action for damages would not lie, especially as it is the active conduct of the defendants which on the facts of the present case brought about the injury to the plaintiff. The other case to which I was referring, namely, *Attorney-General* v. *Guardians of Dorking* (3), does not seem to me to apply to the present case for very much the same reasons. In both cases the substance of the action brought was to compel the defendants to perform their statutory duties. I do not think that I should be justified in going through this latter case at length. I should like, however, to call attention to one passage in the judgment of Cotton L.J., in the case of *Glossop* v. *Heston and Isleworth Local Board* (2), which, I think, throws a little light upon the present case. The Lord Justice was dealing with the question what would have constituted such a user by the defendants in that case of a defective sewer as to make them liable for injury caused by the user of that sewer. He was referring to the words of s. 17 of the Public Health Act of 1875, which begins thus: "Nothing in this Act

(1) 11 Cox, C. C. 580. (2) 12 Ch. D. 102.
(3) 20 Ch. D. 595.

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shall authorize any local authority to make or use any sewer"; and, when he comes to deal with the question, what is the meaning of "use" in that section, he says that "making or using a sewer means that you must not make a sewer which brings down the sewage into the river; you must not use existing sewers for bringing into a stream sewage which you by other means bring into the old sewer." It seems to me that, if you substitute for "old sewer" there "Ford's sewer," it describes exactly what has happened in the present case.

There is a great deal in the judgment of Buckley J. in the case of *Hobart* v. *Southend Corporation* (1), a case now under appeal in this Court, which goes to confirm the judgment of Walton J. in the present case. It is quite true that case did not raise any question of property. It raised, however, among other questions, a question as to the common law right to discharge sewage into the sea, and it did incidentally go into the question of the nature and form of the remedy when sewage is discharged from the land of one man on to the land of another. Of course, what was said in that case has no application unless we get the first step here, namely, that these oyster beds were the land of the plaintiff. But, if they were the land of the plaintiff, then it is very material. Buckley J. says that an action can be brought in such a case by the person who is injured by the discharge from his neighbour's land on to his land of sewage. He points out that the remedy really is of the same nature as the remedy was in the very well known case of *Fletcher* v. *Rylands*. (2) That case ultimately went to the House of Lords, but, when the case was in the Exchequer Chamber, Blackburn J. gave a judgment which is always referred to as being a judgment which most clearly enunciates the principles upon which such an action can be founded.

The result is that I think that this appeal must be dismissed.

STIRLING L.J. I have arrived at the same conclusion as my Lord.

I do not propose to travel over all the ground which has been

(1) 75 L. J. (K.B.) 305.

(2) L. R. 1 Ex. 265; L. R. 3 H. L. 330.

covered by the argument, but I will state very shortly the reasons on which I desire to base the conclusions at which I have arrived.

The plaintiff, who is an oyster merchant, has for twenty years and upwards been in occupation of certain ponds, or beds, artificially constructed on part of the foreshore. These ponds are, some of them, boarded at the sides, and others have sides made of concrete. Some of them are paved with concrete, and others have natural bottoms. In these the plaintiff has placed oysters which have been obtained either by dredging elsewhere, or by importation. He brings them to the ponds, and places them there for fattening. They were, when they were placed in the ponds, his property. He has excluded every one else from these ponds, and he has from time to time removed the oysters deposited there, and sold them and dealt with them as he thought fit; and no one has interfered with his occupation of the ponds, or his dealing with the oysters. What has been done by the plaintiff is totally different from anything that he could have done simply as a member of the public exercising the public right of fishing. In these circumstances I think that the plaintiff had at the time of bringing his action such a possession of the ponds as to entitle him to maintain an action for trespass against a wrong-doer. The plaintiff alleges that the defendants are wrong-doers, inasmuch as they have discharged sewage on to his ponds or beds to the great damage of the oysters.

Now the defendants in the present case are a local board in whom are vested the sewers of the district over which they have control. Their position, regard being had to the statutes and the decisions, is a somewhat complicated one, and I propose to consider in the first place what would be the right of the plaintiff, if the defendants were simply private persons in whom the sewers were vested. What happens is this. The sewage from the sewers is discharged continuously into the sea; at low water it runs away and is no more heard of, but, as the tide comes in, it is caught and borne back and overruns the ponds to the damage of the oysters, as I have already said. Now, as against a private person, this would be actionable on the

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principles laid down in *Fletcher* v. *Rylands*. (1) The principle was thus stated by Blackburn J. in the Exchequer Chamber in that case: "We think that the true rule of law is, that the person, who for his own purposes brings on his lands, and collects and keeps there anything likely to do mischief, if it escapes, must keep it in at his peril, and, if he does not do so, is prima facie answerable for all the damage which is the natural consequence of its escape." No doubt the deposit of this sewage on the land of which the plaintiff was in occupation was a nuisance, but it is a nuisance in respect of which an action for trespass lies. I think it is enough, to establish this, to refer to the judgment of Holt C.J. in the case of *Tenant* v. *Goldwin* (2), which is very much discussed by Blackburn J. in the case I have already referred to. He there sets out the reasons for the judgment given in the report in Salkeld, at p. 361, where it is said: "The reason he"—that is the Lord Chief Justice—"gave for his judgment in the principal case was because it was the defendant's wall, and the defendant's filth, and he was bound of common right to keep his wall so as his filth might not damnify his neighbour, and that it was a trespass on his neighbour, as if his beasts should escape, or one should make a great heap on the border of his ground, and it should tumble and roll down upon his neighbour's. That the case might indeed possibly be such, that the defendant might not be bound to repair, as if the plaintiff made a new cellar under the defendant's old privy, or in a vacant piece of ground which lay next the old privy before, in such case the plaintiff must defend himself. But that cannot be the case here, for then he could not be bound to repair, and upon the words debet reparare he must be acquitted upon the trial. But, on the other side, if A. has two houses, and the house of office on the one is contiguous to the cellar of the other, but defended by a wall, and he sells this house with the house of office, the vendee must repair the wall; so if he keeps this and sells the other, he himself must repair the wall of the house of office, for he whose dirt it is must keep it that it may not trespass." It was suggested in argument that, after the sewage had begun

(1) L. R. 1 Ex. 265; L. R. 3 H. L. 330.
(2) (1704) 1 Salk. 360; 2 Ld. Raym. 1089.

to flow on the beds or ponds of the plaintiff, he ought to have discontinued the deposit of oysters, and that he was not entitled to recover any damage. I fail to see why this should be so. It seems to me that this is an argument which is readily disposed of by reference to the case of *Ballard* v. *Tomlinson* (1), where the doctrine of *Fletcher* v. *Rylands* (2) was applied. There the plaintiff and defendant were adjoining landowners, and had each a deep well on his own land, the plaintiff's land being at a lower level than the defendant's. The defendant turned sewage from his house into his well, and thus polluted the water that percolated underground from the defendant's to the plaintiff's land. Then the plaintiff pumped water from the soil beneath his own land, and brought up the sewage with it. Pearson J., before whom the case came in the first instance, held that, as the plaintiff had no property in the underground water which came from the defendant's land, he had no cause of action against the defendant for polluting such water, and he therefore dismissed the plaintiff's action. In the Court of Appeal that decision was reversed, and it was held that the plaintiff had a right of action against the defendant for polluting the source of supply, although, until the plaintiff had appropriated it, he had no property in the percolating water under his land, and although he appropriated such water by the artificial means of pumping.

I think, therefore, that, as against a private individual, the plaintiff would have a right of action, and I do not think that this case can be governed by the decision in the case of *Corporation of Truro* v. *Rowe*. (3) There the contest arose between the owners of the foreshore and a person who claimed simply to be availing himself of a public right of fishing. Here the contest arises, in my view, between the person who is in occupation of a portion of the foreshore and a wrong-doer. Whether the plaintiff would be able to resist the claims of the owner of the foreshore, whoever he may be, or the owner of a several fishery, if such fishery exists, or of a member of the public exercising a right of fishery, if there be such a right in the

(1) (1885) 29 Ch. D. 115. (2) L. R. 1 Ex. 265; L. R. 3 H. L. 330.
(3) [1902] 2 K. B. 709.

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present case, seems to me immaterial for the purposes of this case in the view which I take of the facts. On those points I desire to express no opinion, it not being necessary in my view for the decision of this case, although I am not to be understood to be differing from what has been said by my Lord.

Another case which was cited in opposition to the plaintiff's title to relief was the case of *Reg.* v. *Downing*. (1) It was said that that case shewed that the plaintiff had no title to relief unless he proved the existence of a several fishery. I cannot agree. It seems to me that the most that was decided in that case was that the prosecutor, who relied on his being the possessor of a several fishery, was able to establish it by oral evidence without producing any documentary title. In the present case it is not necessary, I think, to express any opinion as to whether a several fishery exists or not, but I should like to say that I see no evidence of any title to a several fishery in the plaintiff, and do not rely in any way on the establishment of such a case. I simply rely, as I have said, on the occupation which it seems to me gives a title to bring an action of trespass.

I will now pass on to consider the position of the defendants, who, as I have said already, are a local authority constituted under an order made in 1894. They were constituted at the end of 1894 under the Local Government Act, 1888, in succession to a previously existing authority which had been originally constituted under the Public Health Act, 1848, and subsequent Acts. In 1895, when the Order came into effect which constituted the defendants a local authority, they found certain sewers which had been made and put in operation by their predecessors. These, or some of them, had originally been made under the provisions of the Public Health Act of 1848, s. 46 of which provided that: "The local board of health shall cause the sewers vested in them by this Act to be constructed, covered, and kept so as not to be a nuisance or injurious to health, and to be properly cleared, cleansed, and emptied: And for the purpose of clearing, cleansing, and emptying the same they may construct and place, either above or under ground, such reservoirs, sluices, engines, and other works as may be

(1) 11 Cox, C. C. 580.

necessary, and may cause all or any of such sewers to communicate with and be emptied into such places as may be fit and necessary, or to cause the sewage and refuse therefrom to be collected for sale for any purpose whatsoever, but so as not to create a nuisance." Therefore, down to the time of the passing of the Public Health Act, 1875, which repealed the Act of 1848, the predecessors of the defendants were entitled to cause their sewers to communicate with and be emptied into such places as might be fit and necessary, but so as not to cause a nuisance in the emptying of their sewers. As I have said, the Public Health Act of 1875 repealed the Act of 1848, and, as was pointed out in the argument, the provisions of s. 46 have been split up, and they are enacted with variations in ss. 19 and 27 of the Act of 1875. Sect. 19 provides that: "Every local authority shall cause the sewers belonging to them to be constructed, covered, ventilated, and kept so as not to be a nuisance or injurious to health, and to be properly cleansed and emptied." Then s. 27 provides that: "For the purpose of receiving, storing, disinfecting, distributing, or otherwise disposing of sewage, any local authority may—(1.) Construct any works within their district or (subject to the provisions of this Act as to sewage works without the district of the local authority) without their district; and (2.) contract for the use of, purchase, or take on lease any land, buildings, engines, materials, or apparatus either within or without their district; and (3.) contract to supply for any period not exceeding twenty-five years any person with sewage," and so forth; and then comes this proviso: "Provided that no nuisance be created in the exercise of any of the powers given by this section."

Now, it was contended on behalf of the plaintiff that these sections contained provisions which impose on the defendants the duty of causing the sewers vested in them to be kept so as not to be a nuisance, and the duty of disposing of the sewage so that no nuisance should be created. I think that the contention is well founded, and that the section which is more particularly applicable in the present case is s. 27.

On the other hand, the defendants rely on the decisions in *Glossop* v. *Heston and Isleworth Local Board* (1) and

(1) 12 Ch. D. 102.

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Attorney-General v. *Guardians of Dorking*. (1) In both these cases local authorities constituted under the Public Health Act of 1875 had succeeded to defective systems of drainage constructed by their predecessors, and had simply permitted the previous user of the sewers to continue, without doing, themselves, anything actively. As it is put by Cotton L.J. in the second of those cases (2), the defendants were doing nothing, they were not making any new sewer, nor were they actively exercising any power which they had under the Act of turning sewage, if they had the power, into any course different from that in which it previously went. In that state of things the Court refused any relief by way of injunction, no damages being asked in either case. The section of the Public Health Act of 1875 which was most relied on on behalf of the plaintiffs in those cases was s. 17. It was laid down in both of those cases that, in the circumstances above stated, the defendants were not making or using a sewer within the meaning of that section. It was said in *Glossop* v. *Heston and Isleworth Local Board* (3) that "'making or using a sewer' means that you must not make a sewer which brings down the sewage into the river; you must not use existing sewers for bringing into a stream sewage which you by other means bring into the old sewer." Though in both cases the only point decided was as to the right to an injunction, I think that the judgments in the second case, namely, *Attorney-General* v. *Guardians of Dorking* (1), shew that the Court would have held, if necessary, that there was no right to damages.

Now in this case two points were taken on behalf of the defendants. In the first place it was said that these decisions exactly applied, that the defendants had done nothing themselves, they were not making any new sewers, nor actively exercising any power they had under the Act of turning sewage into a course different from that through which it previously went. I am unable to agree with this contention upon the question of fact. The present defendants unquestionably have made additional sewers, and have turned the sewage coming from a portion of their district, namely, that coming from the New Brighton Road, into

(1) 20 Ch. D. 595. (2) 20 Ch. D. 595, 608.
(3) 12 Ch. D. 102, 125.

a course different from that in which it previously went. The evidence appears to me to shew that since 1892 the effluent has been altered for the worse, both as regards quantity and as regards quality. I think that this result has been brought about actively by the defendants, and, giving the utmost weight to the decisions to which I have referred, I do not think they prevent the Court from awarding damages in the present case. It was also said that the real object of the plaintiff was not to recover damages for injury to himself, but that, as was the case in the two cases cited, the real complaint against the defendants was that they did not put into force the statutory powers which were vested in them to remedy the defective system of drainage which had descended to them from their predecessors. I cannot agree with this contention. I think that in both the cases which have been cited the real grievance was that the defendants did not put in force the statutory powers vested in them; but it appears to me that in the present case the plaintiff has never sought to compel the defendants to put in force the powers of the statute to remedy the defective system of drainage. Some correspondence which passed between the plaintiff and the Local Government Board in 1896 was referred to at a late stage of the argument yesterday. I have referred to it, and it appears to me that in that correspondence the plaintiff was not seeking to have any remedy under s. 299 of the Public Health Act, 1875, but was asking the Board to prohibit the connection of a particular drain with a particular sewer, to which, after consideration, the Board on August 11, 1896, replied that they had no power to direct the local board to do what the plaintiff suggested. I think that the present plaintiff has throughout complained of an injury to his private right, and nothing else.

Further, it was said that the result which would follow from the judgment complained of, would be that the defendants would be made to pay damages for that which they were entitled to do in making orders for sanitary purposes, namely, substituting water-closets for privies. The answer to that seems to me to be that that is not the case—no one desires to interfere with that—but, in exercising the powers given them by s. 27 of

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the Act, they are bound not to create a nuisance to the plaintiff, as it appears to me they have done by their acts.

It was also contended that the defendants had acquired a title by prescription to discharge the sewage into the sea, but, so long as they caused no damage to the plaintiff by their acts, the plaintiff could not complain. His legal rights had not been injured, and on this point I may refer to the well-known case of *Sturges* v. *Bridgman*. (1) On the evidence the damage did not accrue to the plaintiff before 1892 at the earliest, and probably only arose at a very much later date, while the present action was brought in 1902.

I think, therefore, that these contentions on behalf of the defendants fail. The learned judge declined to grant an injunction, and from that refusal there is no appeal. The damages have not yet been assessed, and the learned judge has reserved every point which could possibly arise with reference to their amount or measure.

In these circumstances I agree that the appeal fails.

FLETCHER MOULTON L.J. I am of the same opinion. During the argument a great number of most important points have been raised. I do not wish to suggest in the least that any of them were irrelevant, for they might all, so far as I see, have been material to our decision of the case, but the view that I take of one or two fundamental points makes it unnecessary that I should refer to many of them.

The case itself is a simple one. For a long series of years the plaintiff and his predecessors have been the occupiers of certain oyster beds, which are constructions of the nature of artificial ponds, high up on the foreshore of the locality, into which beds or ponds oysters that have been dredged elsewhere are brought to be laid down in order to fatten, and to be taken from those beds to the market. The plaintiff complains that this property of his, that is to say, which either belongs to him, or of which he is lawfully the occupier, has been injured by the defendants trespassing on it by sending sewage into the beds, rendering the oysters unfit for food.

(1) (1879) 11 Ch. D. 852.

Now, the first question to decide is whether the plaintiff has an occupation or a possession of these beds in the legal sense. If the evidence be looked into, it will be seen that it is uncontested that these beds have existed at Emsworth throughout the whole of living memory. One man was called who was born in 1824, and others were called of ages ranging between sixty and seventy. Most of these witnesses gave direct evidence that oyster beds had been here used for the purposes that I have described throughout the whole of their lives, and throughout the whole of the trial no suggestion was made or evidence tendered to the contrary.

Now, it is an unquestionable principle of our law that, where there has been long-continued enjoyment of an exclusive character of a right or a property, the law presumes that such enjoyment is rightful, if the property or right is of such a nature that it can have a legal origin. I am satisfied that in this case there has been actual possession of a sufficiently long duration; and a possession more exclusive in character could not, I think, be imagined, because the surface of the ground is artificially altered to adapt it for its purpose, valuable objects in the shape of oysters are laid there, and are taken from those beds to be sold in the market; and, if the possession was not exclusive, all those oysters would be capable of being appropriated by the public in general and by the population of the town of Emsworth in particular, which is in the immediate neighbourhood of these beds.

The only question, therefore, that it is necessary to decide on this part of the case is the following: Are oyster beds (using the words in the sense I have described) a property capable of legal recognition? Now the contrary of this is scarcely argued, and could not possibly be successfully maintained. It will be sufficient for me to refer for this purpose to the section of the Larceny Act which relates to oysters, namely, 24 & 25 Vict. c. 96, s. 26. It begins thus: "Whosoever shall steal any oysters, or oyster brood from any oyster bed, laying, or fishery, being the property of any other person and sufficiently marked out or known as such, shall be guilty of felony, and being convicted thereof shall be liable to be punished as in the case of simple larceny." That section,

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which is only one of a large number of similar provisions that I could cite from various Acts of Parliament, is a statutory recognition that oyster beds of this kind can be the property of a private person. Anyone who has had any experience of copyhold cases knows perfectly well that nothing is a more common incident in such cases than "oyster layings" which are held by copy of court roll of the manor. Oyster beds are, therefore, capable of being private property. The oyster beds to which this case refers (or at all events a sufficient number of them) have been occupied for this long series of years exclusively by the plaintiff and his predecessors, and therefore, without troubling myself as to the exact manner in which the right may have arisen in this case, I find that the property is proved to be rightfully in the plaintiff. It may be a property in the nature of occupation, that is to say, that the plaintiff is the rightful occupier of the soil for that special purpose: it may be that the plaintiff is the rightful owner of the soil, and has a right to use it for that purpose, but for the purposes of this case it is not necessary to distinguish between the two.

But, although this finding is sufficient for this part of the case, there has been so much argument as to whether the existence of a several oyster fishery must necessarily be the basis of a rightful title to oyster beds, and as to whether the existence of such a fishery is proved in this case, that I wish to deal with the general question.

The defendants' counsel sought to attack the plaintiff's title by saying that it was impossible, according to English law, to have oyster beds apart from the existence of a several oyster fishery, and that no several oyster fishery was proved to exist in the present case, and that, therefore, there could be no rightful title to these beds. For the reasons which I have given it is not, in my opinion, necessary to meet that argument, but I wish to say for myself that, on examining the authorities, I have come to the conclusion that an oyster bed of this kind, which I prefer to call by the older and unambiguous term of an "oyster laying," has nothing whatever to do with a several oyster fishery, and can exist quite independently of the existence of such a fishery. If we consider what is the purpose of such a bed,

one sees that it has nothing in common with rights of fishing. Rights of fishing signify the right to catch that species of creatures known as feræ naturæ which exist in the sea, and there is no doubt that when, as in a several oyster fishery, or in a public oyster fishery, you dredge oysters from their natural beds, you are fishing, you are taking things in respect of which, in the case of a public fishery, nothing in the nature of a proprietary right exists in anyone, and are appropriating them and making them your own property. But an "oyster laying" does not come into operation until the act of appropriation is finished. It exists only for the purpose of being used in connection with chattels the property of which is in some individual. The oysters are first caught or purchased by the owner, they are then laid down in the "oyster laying" for the purpose of improving, and, unless the owner by so laying them down has committed an act of abandonment, the property still remains in him. Now, it would be contrary to common sense to suggest that an owner by laying down oysters in an oyster bed marked out and constructed for the purpose, in order that they may get into a state fitter for consumption, indicates an intention to abandon them. The act in itself points to a desire to keep them and retain them as private property, and, therefore, unless there be some principle of law by which this act must be taken to be an abandonment, there is nothing in the act itself to lead us to conclude that it is so.

Before I consider the question of law thus raised from the standpoint of authority, I wish to point out that this form of cultivation of oysters has got nothing to do with the origin of the oysters. It is just as necessary that "oyster layings" should exist for the purpose of oysters which are dredged in a public fishery as for those which are dredged in a several fishery. Moreover, the position where these "oyster layings" are usually placed is high up on the foreshore, where they are formed in the shape of shallow ponds, covered by the flux and re-flux of the tide, but by no means in places where natural beds of oysters exist. It cannot be said that their existence de facto limits any rights of taking oysters from their natural beds; they are usually put in places on ground belonging to some individual, that is to say, on parts of

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the waste of the manor, quite away from those places in which the fishing for what I may call wild oysters would take place. In my mind, oysters in an "oyster laying" do not differ substantially, as regards legal status, from lobsters that are in a lobster pot. Everyone has a right to take lobsters in the sea, unless he is thereby interfering with the rights of a several fishery; but, if a lobster is in a lobster pot, and a stranger takes it out, that is not fishing, but taking something the property in which has passed to some individual. If we go a little further, and consider the practice which exists in some parts of the coast, I believe, of placing lobsters that have been captured in larger wicker cages where a considerable number of them can be kept till it is convenient to send them to market, we see a still closer analogy to these "oyster layings." It is quite true that in such cages the lobsters are wholly enclosed, but that is because it is impossible in the case of such fish to keep them safely unless they are so enclosed. The fact that the mature oyster has practically no means of locomotion makes it quite unnecessary that you should place oysters in a wholly enclosed space in order to confine them, but the oysters in an "oyster laying" are just as much kept in captivity as would be the lobsters in a wicker construction of the character that I have described.

It therefore seems to me that, in the absence of authority that these "oyster layings" are not capable of legal existence except as part of a several fishery, there is no ground in good sense why we should suppose that they must necessarily be parcel of or appurtenant to such a fishery.

This method of utilizing the foreshore is not a modern innovation. The case of *Bridger* v. *Richardson* (1) was a case in which a man was proceeded against for destroying oyster fry, by taking it out in a dredge. It took the form of an action of debt to recover a penalty under the statute 3 Jac. 1, c. 12, for taking oyster fry and spat of a size unfit for food. The Court there held that the defendant did not come within the purview of the statute, because his object was to take the oysters, not for the purpose of wilfully destroying them and wasting them,

(1) (1814) 2 M. & S. 568.

but for the purpose of laying them down in "oyster layings" of the kind I have described. The passage to which I wish to call attention is at p. 572 of the report. Lord Ellenborough, in giving judgment, said: "When I look to the usage as it is to be found in the records of the Court, upon questions which have arisen touching the by-laws of the Milton fisheries, I find the habit of taking and removing spawn is extremely ancient; there are, I believe, charters in existence for effectuating that species of fishing, and which existed before the statute of Jac. 1." Therefore, we have here a recognition by the Courts (and I am quite certain that an examination of the court rolls of many manors will shew that it is abundantly justified) that this practice of having "oyster layings" for this particular purpose is extremely ancient. Now, the question is, how it could exist apart from a several fishery? It appears to me that it could exist as a reasonable exercise of his ownership of the soil by an individual in whom the soil of the foreshore was vested. It must not be forgotten that, where the foreshore has been granted to an individual, it is his property just as much as the land in terra firma. His rights over it are indeed subject to the rights of navigation of all the King's subjects, and subject also to their rights of fishing, but that does not prevent his having great powers of modifying that foreshore for his own purposes. For example, he can build walls and quays, and he can do that which is quite the strongest assertion of absolute ownership, namely, he can reclaim, and thus entirely exclude the public from it. Of this there can be no doubt. There are references in the case of *Blundell* v. *Catterall* (1) to it, and to the large extent to which such reclamations have been carried on in the past, and will probably be carried on in the future. In the case of *Lord Advocate* v. *Young* (2) Lord Watson uses the fact of reclamation of foreshore as an act of ownership demonstrating the title of the person doing it to the foreshore. Yet when regarded from an abstract point of view all such acts must more or less modify and affect the rights of navigation and fishing as they previously existed, but, as they did not substantially injure such rights and were of a character to conduce to the good

(1) (1821) 5 B. & A. 268. (2) (1887) 12 App. Cas. 544.

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of the community, they were looked on with favour and held to be legal. The same principle would apply to the formation of "oyster layings." This use of the foreshore in places where there were no natural oysters would in no way interfere with the rights of the public to fish. The oysters lying in them would not be oysters that were feræ naturæ, if they were placed there by the owner with the permission of the owner of the soil for the purpose of fitting them for market. The formation and use of such "oyster layings" therefore injured no one, and aided, and indeed rendered possible, the oyster industry; and, accordingly, I have no doubt that this is a mode of utilizing the foreshore which works for the general benefit of the realm, that is to say, which adds to the industries of the realm, that would have been, and in fact was, viewed in the middle ages as being perfectly legitimate, and which has been largely carried on both then and since.

Now, in order to test the accuracy of this view I have examined the statutes which, from time to time, have been passed with regard to oyster fishings, and it seems to me that they clearly shew not only that the Legislature considered that such a user of the foreshore was permissible, but that it created a form of private property over which the Legislature threw the protection of the law in the most marked manner. The earliest of the statutes, to which I shall refer, is the Act 31 Geo. 3, c. 51, which is headed, "An Act for better protecting the several oyster fisheries within this kingdom," and which prescribes that persons taking oysters or oyster brood from such fisheries shall be guilty of a misdemeanour. That statute, taken by itself, would help us very little, because the title limits it to several oyster fisheries. But the amending Act, 48 Geo. 3, c. 144, is full of significance. It contains the following recital: "Whereas an Act of Parliament passed in the 31st year of the reign of his present Majesty, intituled an Act for better protecting the several oyster fisheries within this kingdom: And whereas the provisions of the said Act have been found inadequate to the protection of the oyster fisheries of this kingdom: And whereas doubts have arisen since the passing of the said Act whether the taking oysters or oyster brood from any

oyster bed or laying, or from any oyster fishery, can under any circumstances be deemed felony and punishable as such, and it is therefore expedient and necessary that more effectual provision should be made for the protection of the oyster fisheries, and for removing such doubts as aforesaid." The Act then enacts that anyone who after a certain date "shall knowingly and wilfully steal, take, and carry away any oysters or oyster brood from any oyster bed, or oyster laying, or oyster fishery, being the property of any person or persons, or body, or bodies politic or corporate, and sufficiently marked out as such, shall be deemed guilty of felony." It seems to me that the meaning of this provision is that the existence of the previous Act (which had made taking oysters in breach of its provisions a misdemeanour) had given rise to doubt as to whether taking oysters from "oyster layings" which were private could under any circumstances be called felony, and consequently the amending Act was passed, which, instead of limiting its provisions to several fisheries, drops out the word "several," and specifically applies them to every "oyster bed, or oyster laying, or oyster fishery." It will be found that, from and after that time right down to the Larceny Act, to which I have referred, the phrase "oyster bed, oyster laying or oyster fishery," is rigorously adhered to, and the only requirement with regard to such beds is that they must be the private property of some individual, and must be properly marked out as such. It seems to me, therefore, that this legislation clearly shews that oyster beds and "oyster layings" may exist which are not "several oyster fisheries," and perhaps do not come properly under the title "oyster fishery" at all.

There are other statutes which justify the same conclusions. I will, however, confine myself to citing a group of three such statutes. They are Irish statutes, but I can find no justification for thinking that the law with regard to this subject is different in Ireland from what it is in England, except so far as it has been altered by statute. Now, here there are some very curious confirmations of the views which I have put forward. In 5 & 6 Vict. c. 106, which is an Act applying to oysters, or rather to oyster fisheries, it is enacted

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by s. 11 that "if any person shall steal any oysters or oyster brood from any oyster bed, or laying, being the exclusive property of any other person or persons, and sufficiently marked out and known as such, every such offender shall be deemed guilty of larceny." That Act speaks of stealing from an oyster bed or an oyster laying alone, and does not mention an oyster fishery. Now, it seems to have been thought, whether from some case which occurred at the time or not I do not know, that this provision might go too far and be used to justify the appropriation of oyster beds, in circumstances under which the law would not otherwise justify it. Accordingly we find a clause in an Act passed two years afterwards guarding it against this misinterpretation, namely, 8 & 9 Vict. c. 108, s. 16. This later Act says: "And be it enacted and declared that nothing in the said first recited Act"—which is the Act to which I have just referred—"shall be construed to protect as an exclusive right or private property any oyster bed or oyster fishery lying below the level of the lowest water of spring tides, or to subject any person to be deemed guilty of or to be indicted for larceny for taking oysters from any such oyster bed or fishery, unless such oyster bed or fishery shall be legally possessed and enjoyed by some person by virtue of charter, grant, patent, or Act of Parliament, in and by which such oyster bed or fishery is specially granted, and the limits thereof accurately described, or unless the same has been held and enjoyed by prescription as an exclusive right and private property within limits clearly defined." It therefore says that, unless you can prove your title by prescription or by grant or Act of Parliament, you shall not under the former Act of Parliament claim protection for a bed below the lowest level of low water, shewing clearly that the Legislature thought that oyster beds might be the private property of individuals and entitled to the protection of the Act on the foreshore, which is above the lowest level of low water, even though they were possessed not by prescription and not by grant or Act of Parliament. In other words it recognized the fact that the property in oyster beds might be acquired in other ways than would be essential to the acquisition of a several oyster fishery.

I will only refer to one other very peculiar provision in a statute, which appears to me to support the same view. It is also in an Irish statute, namely, 13 & 14 Vict. c. 88, s. 41. It was passed for the purpose of facilitating the establishment of oyster layings, and, without quoting it, I will give very shortly the provisions to which I refer. It says that, if people have land bordering on the sea, the Commissioners may—of course, it must mean out of the land belonging to the Crown—grant them portions of the foreshore for the purpose of forming oyster layings thereon. It speaks only of persons having land adjoining the sea; it says nothing about persons who own the foreshore itself, for the language of the section makes it perfectly clear that "bordering on the sea" does not mean "owning the foreshore." It seems to me that the fact that no reference is made to the people who would most rightfully ask for the assistance of the Commissioners to form oyster layings, that is to say, the people who owned the foreshore, points to the fact that the Legislature realized that they would be able to use the land for this purpose without this assistance. I am, therefore, of opinion that "oyster layings" placed in a locality where there are no natural oysters, and on land which belongs to the occupier, or is occupied by him with the permission of the person who owns it, are forms of property recognized by the law and are quite independent of the existence of several oyster fisheries.

Sir Robert Finlay quoted against himself at the close of his argument two American cases dealing with the subject, which I find decide the point in the same way and for the same reasons as those at which I have independently arrived. They both recognize that no such "oyster laying" must be placed in the middle of a natural oyster bed, because that would prevent the user of their right to dredge oysters in such bed by those entitled to it, who may be the general public. I notice that in the section of the Act to which I have last referred, which provided for the formation of new "oyster layings," there is a reference to the same thing, namely, that the "oyster laying" must be put in a place where there are no natural oysters. Perhaps the more striking of the two American cases is *Fleet* v. *Hegeman* (1), the

(1) 14 Wend. (N.Y.) 42, at p. 47.

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judgment in which says, with regard to oysters in an oyster bed clearly marked out in an arm of the sea: "They have been reclaimed, and are as entirely within his possession and control as his swans or other water-fowl that may float habitually in the bay. They were distinctly designated according to usage, and, besides, the defendants had actual information of the ownership, and they can set up no greater right to take them because found in their native element than tame pigeons in the air or a domesticated deer upon the mountain. If the bed interfered with the exercise of the common right of fishing, or if the oysters were undistinguished among others belonging to the public waters, the interest of the owners in them would undoubtedly be subservient to the enjoyment of the public use. But the exercise of that right in this case was a mere pretence. No oysters of the natural growth of the bay, fit for use, had been found there for years. The bed interfered with no other sort of fishing for either profit or pleasure." The same may be said in respect of the oyster beds in the present case and is characteristic of the English "oyster layings." In my opinion the American law as thus formulated does not differ from our own, and, as I have said, English "oyster layings" may be lawfully enjoyed without their being connected in any way with a several fishery.

Now, passing from the question of the plaintiff being legally the owner or occupier of these oyster beds, I turn to the second half of the case, namely, the question whether there has been an interference with the rights of the plaintiff by the defendants. I do not propose to go over the ground which has been so thoroughly covered by the judgments of my brother Lords Justices. I only wish to say that in my opinion the order confirmed by the the Local Government Board practically made the defendants the successors for all purposes of the Havant Union. I think that they have failed to establish their title by prescription on the ground stated by Stirling L.J., namely, that no prescription could commence as against the plaintiff until his property was interfered with, and that there is no evidence that his property had been interfered with to any substantial degree during the necessary number of years, before he brought his action. Therefore, the claim with regard to prescription fails.

A suggestion has been made that there is a common law right to drain into the sea. I know of no such right. The right that was attempted to be set up under the Public Health Act of 1848 is a most limited right confined to houses within 100 feet of the sea, and quite inapplicable to the present case.

Then comes the question that has been raised and argued so very exhaustively of the difference between misfeasance and nonfeasance. In my opinion that point does not in any way arise here. The defendants in the execution of their powers did several acts substantially altering the nature of the outflow from their sewer, and, in my opinion, altering it so that the interference with the plaintiff's property—I had better say the substantial interference with the plaintiff's property—commenced with their action. It is no use, in my opinion, to say that their "pick-up" sewer cut off drains which also interfered with these beds. It is not by any means clear that the rights of drainage which they interrupted by their "pick-up" sewer were as yet established by prescription. These rights were certainly much more limited than those which would grow up out of the construction and user of the defendants' sewer. The defendants chose, however, to construct this "pick-up" sewer and make it discharge into Ford's sewer. They thus stopped any growth of prescription in respect of the old user of those small sewers, and they cannot avail themselves of the fact that in some ways they ameliorated the conditions of the oyster beds in order to save themselves from the consequences of having made a new sewer and drained it into Ford's sewer. The same remark applies to the northern sewer, which comes from the New Brighton Road. And in addition to all this they exercised in various ways the authority vested in them as a public sanitary authority so as to increase largely the discharge from Ford's sewer.

I am of opinion, therefore, that there has been a substantial increase of the interference with the plaintiff's rights by the acts of the defendants, and, without in any way touching the question as to whether, if they had merely sat still and done nothing, the interference with the plaintiff's rights would have put him in the same legal position as he now is, I have no doubt that

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they have been guilty of active interference with his rights, and that the judgment of Walton J. was correct, and that this appeal ought to be dismissed.

Appeal dismissed.

Solicitors for plaintiff: *Stow, Preston & Lyttelton, for Raper, Freeland & Tyacke, Chichester.*

Solicitors for defendants: *Palmer & Bull, for J. W. L. Cooper, Emsworth.*

E. L.

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Feb. 27.

HOPKINS *v.* GUDGEON; GUDGEON, CLAIMANT.

Bill of Sale—Registration—Apparent Possession—Bona fide Purchase—Execution Creditor—Bills of Sale Act, 1878 (41 & 42 *Vict. c.* 31), *s.* 8.

In 1903 G., the owner of certain furniture in a house occupied by him, sold the furniture to a limited company by an agreement which was not registered as a bill of sale. In 1904 the company bona fide sold the furniture to G.'s mother by a document which was not registered. In 1905 the furniture, which had during the whole time remained in the apparent possession of G., was seized in execution under a judgment obtained against him. His mother having claimed the furniture:—

Held, that, as the claimant could neither shew a registered title nor that she had taken possession so as to render registration unnecessary, her title could not prevail against that of the execution creditor.

APPEAL from a decision of the judge of the Portsmouth County Court in an interpleader proceeding in which the claimant, Ann Gudgeon, claimed certain furniture which had been seized in execution under a judgment against the defendant, T. W. Gudgeon.

The defendant had for some years prior to October, 1903, carried on the business of a furniture dealer at Ryde, and in the latter end of that year, he being in financial difficulties, a company was formed, of which he was one of the directors, for the purpose of taking over his business. At this time the defendant lived at the business premises, and had certain furniture in the rooms occupied by him for his private use. The company purchased the whole of the furniture in the house, including that in the private use of the defendant. The agreement of purchase was not registered as a bill of sale.

Upon the formation of the company the defendant continued to occupy the same rooms and to use the same furniture in precisely the same way as he had done before the company was formed. The company paid the defendant a salary of 5*l.* per week as manager, and the defendant paid the company 1*l.* per week for the hire of the furniture in his private use.

In May, 1904, the company was in financial difficulties, and it was arranged that the claimant, who was the defendant's mother, should purchase the furniture in the defendant's private use for 200*l.*, and the transaction was carried out by two letters of July 1 and July 2, 1904, which passed between the company and one George Gudgeon, who was acting on behalf of the claimant in the transaction, and who on her behalf paid the agreed sum of 200*l.* to the company. Neither of these two letters was registered as a bill of sale, nor was any other document in the transaction so registered. The furniture remained in the defendant's possession on the same premises after the purchase in exactly the same way as before the purchase and before the formation of the company. There was no record of any kind in the company's books of the purchase by the claimant. The defendant continued to live on the company's premises and to remain in possession of the furniture until December, 1904, when he removed to a private house in Southsea, and the furniture was removed by him to that house, where he continued to use it. About the end of 1904 the defendant was made a bankrupt, and the company at the date of the proceedings in the county court was in liquidation. In April, 1905, judgment in the present action was signed against the defendant, and the furniture in question was seized in execution under the judgment in May, 1905.

The county court judge disallowed the claim of the claimant, and gave judgment in favour of the execution creditor on the grounds that the furniture remained in the possession of the defendant, both actual and apparent, from the period before the formation of the company continually up to the time of the seizure under the execution in the action; that the evidence of the transaction of the sale to the company by the defendant was contained in the articles of association, which were never registered as a bill of sale; that the evidence of the sale by the company to

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the claimant was contained in the letters of July 1 and July 2, which were not so registered; and that the transaction was void as against the execution creditor under the Bills of Sale Act, 1878, and also as constituting a fraud upon the creditors of the company.

The claimant appealed.

Grimwood Mears, for the claimant. The county court judge was wrong. *Morewood* v. *South Yorkshire Ry. and River Dun Co.* (1) is a distinct authority in the claimant's favour, for it shews that only the immediate title to the goods is to be regarded.

[LORD ALVERSTONE C.J. In that case the question was as to a fraudulent conveyance; different considerations may arise where the question is non-registration as a bill of sale.]

The principle of that case, and of *Antoniadi* v. *Smith* (2), is that, although the claimant's title may be derived from a person who had a defeasible title, yet if the claimant takes steps to perfect his title and does in fact do so, as in the present case the claimant did, the transaction cannot be impeached. In this case the transfer from the defendant to the company might have been defeated by his trustee in bankruptcy or by his creditors, but no steps were taken to avoid that transaction, and therefore the transfer from the company to the claimant cannot be successfully attacked, for when the furniture was removed to Southsea it was taken out of the apparent possession of the company.

English Harrison, K.C. (*Cababé* with him), for the execution creditor. The claimant must make out her title. She acquired no better title than the company: *Karet* v. *Kosher Meat Supply Association* (3); and the company, in view of the judgment debtor's bankruptcy, had no title to the furniture, and could, therefore, transfer no title to the claimant. *Antoniadi* v. *Smith* (2) is not an authority in the claimant's favour; in that case, as Vaughan Williams L.J. pointed out in his judgment, there was not at the time of the second transaction a trustee in bankruptcy entitled to claim the goods; in the present case there was a trustee who

(1) (1858) 3 H. & N. 798.
(2) [1901] 2 K. B. 589.
(3) (1877) 2 Q. B. D. 361.

could have claimed. Further, in that case the claimant had registered her title. [He also referred to *Cookson* v. *Swire*. (1)]

Grimwood Mears, in reply.

LORD ALVERSTONE C.J. In my opinion the decision of the county court judge was right.

The facts in this case may be stated in a very few sentences. The goods in question from 1903 down to the time of the levy of the execution in 1905 were throughout in the apparent possession, and probably in the actual possession, of the defendant, the judgment debtor. In 1903 he sold his business, including the goods in question, to the company by a document in the nature of a bill of sale, but not registered, and if the question had then arisen between the company and an execution creditor of the defendant the transaction would have been held invalid. In July, 1904, the claimant, who was the defendant's mother, bona fide purchased the goods from the company, paying for them the sum of 200*l*., but there was no document carrying out this transaction registered as a bill of sale. Some time afterwards the judgment debtor removed to Southsea, and the goods still remained in his apparent possession.

Upon these facts the simple question is, Can the claimant, as a bona fide purchaser from the company, defeat the title of the execution creditor, there having been no registration of any part of the transaction? I say "any part," because, on Lord Selborne's judgment in *Cookson* v. *Swire* (1), it might be contended that registration by the claimant of the transfer from the company to her would have been sufficient; as to that I express no opinion. The broad point upon which I decide this case is that, as no part of the title is upon the register and as the goods remained throughout in the possession of the judgment debtor, the claimant's title cannot prevail against that of the execution creditor.

As to the cases which have been cited, in *Cookson* v. *Swire* (1) the transaction had been perfected by possession. That case shews that where the first bill of sale has become a spent document the assignee under the second bill of sale need not

(1) (1884) 9 App. Cas. 653.

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rely upon it. Except as a matter of history, the old bill of sale was not necessary to establish the claimant's title. In *Karet* v. *Kosher Meat Supply Association* (1), it was held that a person claiming title must prove a registered bill of sale. *Antoniadi* v. *Smith* (2) does not affect this case. The decision there turned largely on the fact that the claimant was in possession, and it was not therefore necessary for her to re-register the original bill of sale. In *Morewood* v. *South Yorkshire Ry. and River Dun Co.* (3), the question was not as to registration, but it was an attempt to impeach an honest transaction by an antecedent fraudulent transaction, and, as Bramwell B. pointed out, the person claiming was not affected by the fraud.

In my judgment, where a person sets up within a period of five years as against a judgment creditor a title to goods which have been throughout in the possession of the judgment debtor, he must shew either a registered title or that something has been done in the way of taking possession which renders registration unnecessary. The county court judge was right in holding that the transaction with the company was not sufficient to justify the claimant's claim to the goods as against the execution creditor.

RIDLEY J. I agree.

DARLING J. I am of the same opinion.

Appeal dismissed.

Solicitors for claimant: *Geare & Willis, for Bowker & Sons, Winchester.*

Solicitor for execution creditor: *C. E. Beal, for J. Robinson, Southsea.*

(1) 2 Q. B. D. 361. (2) [1901] 2 K. B. 589.
(3) 3 H. & N. 798.

W. J. B.

DARTFORD BREWERY COMPANY, APPELLANTS *v.* THE QUARTER SESSIONS FOR THE COUNTY OF LONDON, RESPONDENTS. 1906 *April* 26, 27.

Licensing Acts—Renewal of Licence—Reference to Quarter Sessions—Report of Licensing Justices—Admissibility of Report as evidence before Quarter Sessions—Licensing Act, 1904 (4 *Edw.* 7, *c.* 23), *s.* 1, *sub-s.* 2.

Although the report made by licensing justices under s. 1, sub-s. 2, of the Licensing Act, 1904, on a reference by them to quarter sessions of an application for the renewal of a licence has to be considered by the quarter sessions, it is not evidence upon which that Court is entitled to act in dealing with the application. The quarter sessions can only act upon evidence given upon oath before them.

CASE stated by the chairman of the quarter sessions for the county of London.

On February 25, 1905, the licensing justices for the district of Blackheath caused to be served on the licensee and registered owners of the Trinity Arms public-house, Church Street, Deptford, a notice of objection to the renewal of the existing on licence in respect of that house on the ground that it was unnecessary owing to the number of other licensed houses in the vicinity.

On March 13, 1905, the licensee of the premises applied for a renewal of his licence, but the licensing justices being of opinion that the question of its renewal required consideration on grounds other than those on which the renewal thereof could be refused by them, decided to refer the matter to the quarter sessions. Accordingly on April 25, 1905, the justices referred the matter to quarter sessions and reported thereon in the following terms :—

"Trinity Arms, Church Street, Deptford. } There are five licensed houses within 151 yards of this house, viz. :

The Queen Charlotte public-house . .	130 yards.
Robin Hood and Little John public-house .	105 yards.
Simla (off licence)	47 yards.
Joiners' Arms beerhouse	48 yards.
(also reported)	
And the Walter Arms beer-house . .	151 yards.

There are forty-three shops and 358 private houses within 200 yards. The Trinity Arms is one of the smallest of the licensed

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houses which have been mentioned, and it is in a rough neighbourhood consisting of very poor streets. An attempt was made at the hearing to shew that there was a considerable floating population of factory hands and men employed at the cattle market. But the market is at a distance of more than a quarter of a mile from this house, and there are numerous licensed houses between the market and the Trinity Arms public-house. The licensee said that he did a considerable trade in dinners, sometimes serving as many as forty dinners a day. The bench consider that the number of licensed houses in the area referred to is excessive, and that of the houses mentioned this and the Joiners' Arms may best be suppressed."

At the hearing before the quarter sessions on June 26, 1905, evidence was given on behalf of the renewal authority of the number of licensed houses in the district, as to the character and population of the locality between the respective distances of the public-house and the other licensed houses above referred to, and a plan of the district and a photograph of the premises were produced. Evidence was also given for the first time suggesting that certain of the sanitary arrangements of the premises and the floor of the bar parlour were in a dangerous and defective condition, but the Court was of opinion that these allegations were not established by the evidence.

No evidence other than that referred to in the preceding paragraph was given to differentiate the said public-house from the other licensed premises mentioned in the justices' report.

It was objected on behalf of the licensee and registered owners that there was no evidence before the quarter sessions entitling them to refuse to renew the licence, but the Court, by a majority, decided that sufficient evidence had been given before them to differentiate the Trinity Arms from the other public-houses mentioned; and accordingly the renewal was refused.

The question for the opinion of the Court was whether the quarter sessions were legally entitled under the circumstances to refuse the renewal of the licence.

Avory, K.C. (*T. E. Haydon* with him), for the appellants. The quarter sessions were not entitled to refuse to renew this licence,

there being no evidence before them to differentiate the particular public-house from the other houses in the district. The report of the licensing justices to quarter sessions was not evidence, and indeed the case does not raise the question of its admissibility. The case therefore comes exactly within the decision in *Raven* v. *Southampton Justices* (1), a case which has been approved by the Court of Appeal in *Rex* v. *Drinkwater, Ex parte Conway.* (2) In *Rex* v. *Tolhurst* (3) it was decided that the opinion of the justices of a licensing district that the renewal of a particular licence shall be referred to quarter sessions must be based upon evidence given upon oath. That applies with greater force to the decision of quarter sessions, by whom alone the question is to be determined. This is made clear by the decision in *Rex* v. *Southampton Justices, Ex parte Cardy* (4), that quarter sessions in dealing with this matter are acting judicially. The requirement of having evidence upon oath differentiating this house was therefore not satisfied in this case.

Bodkin, for the respondents. Apart from the justices' report it must be admitted that there was no evidence before the quarter sessions sufficient to differentiate this house from the others in the district; but the report is in itself evidence, for it is provided by s. 1, sub-s. 2, of the Licensing Act, 1904, that such reports are to be considered by quarter sessions. The report is the result of proceedings inter partes, and is based upon sworn testimony given before the licensing justices, who can only receive the evidence in reference to renewals upon oath and after notice has been given to the licensee: see the Licensing Act, 1872, s. 42, and *Rex* v. *Tolhurst* (3), where the decision was that there must be some evidence before the licensing justices before they can refer the question of the renewal of a licence to quarter sessions. In these circumstances the quarter sessions were entitled to act upon the report so arrived at. In *Raven* v. *Southampton Justices* (1) the sole question was whether there was sufficient evidence in law entitling the quarter sessions before the Act of 1904 came into operation to refuse the renewal. That case, therefore, is not in point, the question here being as to

(1) [1904] 1 K. B. 430.
(2) (1905) 22 Times L. R. 12.
(3) [1905] 2 K. B. 478.
(4) [1906] 1 K. B. 446.

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what evidence can be acted upon. Furthermore, although prior to the Act of 1904, the quarter sessions had to receive all evidence upon oath, they now have under the Licensing Rules, 1904, a discretion as to this: see r. 37, which provides that "the compensation authority may, if and to such extent as they think fit, require any evidence given before them at any meeting held under these rules to be given on oath." That rule shews that evidence may be received by quarter sessions although not given upon oath, and this view is supported by the fact that the real inquiry is before the licensing justices. On this ground also the quarter sessions were entitled to act upon the report.

Avory, K.C., in reply. The fact that the quarter sessions in dealing with these matters are acting judicially is conclusive to shew that they can only act upon evidence given in the ordinary way, that is, upon oath. When it is remembered that the licensee has no control over what appears in the report, this is the only reasonable view that can be taken. As to the Licensing Rules, 1904, the provisions of r. 37 are satisfied by making them apply to the preliminary meeting of the compensation authority held in accordance with rr. 9 and 10.

RIDLEY J. We are of opinion that the quarter sessions were not entitled to refuse the renewal of this licence. The question raised is as to the licence of the Trinity Arms public-house, Deptford, in respect of which the justices of the licensing district, acting under s. 1, sub-s. 2, of the Licensing Act, 1904, made a report to quarter sessions. In the course of that report the justices stated that "the bench consider that the number of licensed houses in the area referred to is excessive, and that of the houses mentioned this [the Trinity Arms] and the Joiners' Arms may best be suppressed." That report came before the quarter sessions, and at the hearing evidence was given of the number of licensed houses in the particular district, as to the character and population of the locality, and a plan of the district and a photograph of the premises were produced. Evidence was also given suggesting sanitary and structural defects in the Trinity Arms, but the Court was of opinion that these allegations were not established by the evidence. No other

evidence was given to differentiate the Trinity Arms from the other licensed premises mentioned in the justices' report, and the respondents' counsel admitted that he could not suggest that there was any such differentiating evidence, unless the report was to be taken into account; and he argued that the report was evidence which should guide the quarter sessions in the conclusion they should arrive at. The question for our consideration, therefore, is whether the report which is furnished to quarter sessions by the justices of the licensing district is a document which in itself is evidence upon which the quarter sessions are entitled to act. I am of opinion that it is not.

In dealing with this question the condition of things brought into existence by the Licensing Act, 1904, has to be kept in mind. This particular procedure was introduced by that statute, which by s. 1, sub-s. 2, provides that where the justices are of opinion that the question of the renewal of any on licence requires consideration on grounds other than those specified, they are to refer the matter to quarter sessions, together with their report thereon, and quarter sessions are to consider such report, and may, subject to the payment of compensation, refuse the renewal of the licence. In more than one case we have decided that the result of that sub-section is that the justices of the licensing district, who first deal with the matter, are not the body who have to decide anything, that their function is merely to say whether the renewal of any particular licence requires consideration, and if they think it does, they are to refer the matter to quarter sessions. Quarter sessions, through a committee, are to decide, not by way of appeal from the divisional justices, but originally, whether the renewal is to be granted or not. That being the state of things introduced by the Act of 1904, what are the decisions which bear upon the question? It is first of all necessary to refer to the case of *Raven* v. *Southampton Justices*.(1) In that case, which, it is true, was decided before the Licensing Act, 1904, was passed, the question was considered how and in what circumstances the quarter sessions could take away a licence, where it was alleged that there were too many public-houses in the particular locality; and it was decided that there

(1) [1904] 1 K. B. 430.

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must be some evidence shewing a difference between the house, the licence of which it was proposed to refuse, and the other licensed houses. That was the decision of the majority of the Court, and indeed of the whole Court, for Kennedy J. differed only in thinking that the evidence given in that case was sufficient. After the decision in *Raven* v. *Southampton Justices* (1), which received the approval of the Court of Appeal in *Rex* v. *Drinkwater* (2), the Act of 1904 came into existence, and upon it the case of *Rex* v. *Tolhurst* (3) was decided. In that case the question which immediately arose for decision was whether the justices at the preliminary inquiry were entitled to refer particular licences for consideration to quarter sessions without hearing evidence relating thereto, and acting merely upon their own knowledge, and the decision was that they must have evidence before them. It is true that *Rex* v. *Tolhurst* (3) is not precisely in point in the present case, for here the question is not what the divisional justices were entitled to do, but what the quarter sessions were entitled to do; but the chain of reasoning derived from it has application here. In *Raven's Case* (1) it was decided that there must be evidence before the quarter sessions differentiating the particular house from the others in the locality: then, in *Rex* v. *Tolhurst* (3), that the justices of the licensing district, acting under the Act of 1904, are in this respect in the same position; namely, that they must have some evidence before them—not necessarily of so detailed a character as is required at quarter sessions—differentiating the particular house. If that is true of the justices of the licensing district who have to report, a fortiori it is true of the quarter sessions which has to decide.

The decision of *Rex* v. *Tolhurst* (3) was also based upon the ground that s. 42 of the Act of 1872 still applies, by sub-s. 2 of which the justices are not to entertain any objection to renewals or to take any evidence with respect to the same unless written notice of intention of opposition has been served upon the licensee at least seven days before the general annual licensing meeting; and by sub-s. 3 of which the justices are not to

(1) [1904] 1 K. B. 430. (2) 22 Times L. R. 12.
(3) [1905] 2 K. B. 478.

receive any evidence with respect to the renewal of a licence which is not given upon oath. It would be a strong thing to hold that the quarter sessions now on such a question are entitled to act upon evidence not taken upon oath. In *Rex* v. *Southampton Licensing Justices, Ex parte Cardy* (1), we decided that the quarter sessions acting in this capacity are a judicial body and may state a case. In that decision, to which I was a party, the main point was whether or not the quarter sessions could state a special case, and in arriving at the conclusion that they could we held they were acting judicially, and it was because they were acting judicially that they had jurisdiction to state a case. Since they are acting judicially, the evidence upon which they can act must be evidence given upon oath. Mr. Bodkin relied strongly upon r. 37 of the Licensing Rules, 1904, for the purpose of shewing that the quarter sessions are not obliged to receive evidence upon oath. But it is to be borne in mind that there are other meetings of the compensation authority to be held, besides the principal meeting, at which the question is finally decided, and it is with regard to these other meetings that the provisions of r. 37 apply. When it is considered that the Legislature has said that even in these private meetings evidence may be required to be given upon oath, it is very unlikely that Parliament supposed that when the rights of parties were to be affected, the quarter sessions should be allowed to hear evidence not given upon oath. I am clearly of opinion, not only upon principle, but upon authority, and also upon the construction of this statute itself, that there was not in this case any evidence differentiating this house from the others. I do not think the quarter sessions considered that the report would do, but I am not quite sure about that. I think it was the only argument left to Mr. Bodkin, and, as I have said, I am of opinion that it was not evidence. This appeal must therefore be allowed.

DARLING J. I am of the same opinion. It is agreed that there was no evidence before the committee of quarter sessions differentiating this particular house, except the report of the justices of the licensing district. That report was, of course, not evidence

(1) [1906] 1 K. B. 446.

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Darling J.

upon oath, and the whole question is whether or not it was evidence at all. The respondents contend that although no such thing could have been treated as evidence before the Act of 1904, there is now an original jurisdiction given to the committee of quarter sessions, that the procedure has been entirely revolutionized, and that such reports can now be acted upon by the committee of quarter sessions, although that committee is a Court acting judicially and subject, as we decided in *Rex* v. *Southampton Justices, Ex parte Cardy* (1), to the ordinary incidents of such a Court, one of these being the power to state a case. One would find it difficult to come to this conclusion unless the Act said so in plain terms, and I cannot find that it does say so. All that the Act says is that the quarter sessions shall consider the report; it does not say that they may act upon no evidence at all. Then come the Licensing Rules. They provide how the quarter sessions are to consider the report; they further provide for several meetings being held by the compensation authority—there is to be a preliminary meeting, and there is ultimately to be a final meeting. At the preliminary meeting the parties interested are not entitled to be present. The principal meeting is provided for by r. 14, and at that meeting the compensation authority are to determine as to the renewal or refusal of the licence. Rule 17, which deals with the principal meeting, requires the compensation authority in each case to give an opportunity of being heard to all persons to whom they are required to give that opportunity under s. 1 of the Act. Rule 19 provides that the principal meeting at which the question is finally disposed of is to be open to the public. Then comes r. 37, upon which the argument for the respondents was founded. That rule appears to me to mean this: There is a preliminary meeting—there may be more than one preliminary meeting—and there is a final meeting. The preliminary meeting is not a meeting at which a final decision can be come to, but notwithstanding that, it may be advisable that something more should be considered than the mere report of the justices of the licensing district, which, it is quite clear, is not upon oath. How are the compensation authority to get any information

(1) [1906] 1 K. B. 446.

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beyond the report? They may get it by statements by police-officers and others. Even at this preliminary meeting the compensation authority may, if they like, require such further information to be given upon oath. But it is not said that the procedure of a Court which is subject to the ordinary rules governing judicial procedure is to be revolutionized so that the quarter sessions may be able to decide upon testimony which is not given upon oath. In this case the quarter sessions had nothing before them to differentiate between these various public-houses, and it has been decided that a renewal cannot be refused unless a differentiation can be shewn; they had, therefore, nothing before them upon which they were entitled to act, and the appeal must succeed.

Appeal allowed.

Solicitors for appellants: *Nicholson, Graham & Beesly.*
Solicitor for respondents: *Sir Richard Nicholson.*

W. J. B.

HARRISON *v.* THE OWNER OF NEW STREET MEWS.

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May 3.

Metropolis—Management Acts—Passage not being a Thoroughfare—Requirement of Owner to pave a second time with different Material—Metropolis Management Act, 1855 (18 & 19 *Vict. c.* 120), *ss.* 99, 100.

The owner of a court, passage, or public place, not being a thoroughfare, who has once in obedience to a notice in that behalf under s. 100 of the Metropolis Management Act, 1855, paved or covered the same to the satisfaction of the vestry, cannot be called upon a second time to pave or cover it with a different material; all he can be required to do is to repair the existing pavement or covering.

CASE stated by a metropolitan police magistrate.

The respondent was summoned in October, 1905, to answer an information laid by the appellant, Arthur Harrison, borough engineer, on behalf of the council of the metropolitan borough of Southwark, under s. 100 of the Metropolis Management Act, 1855, charging that the respondent had failed to sufficiently pave and cover the surface of the passage not being a thoroughfare, known as New Street Mews, Kennington, within the metropolitan

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borough of Southwark, within fourteen days after notice in writing had been given to him requiring him to do the work to the satisfaction of the council.

At the hearing it was proved that the respondent was the freeholder of the court, passage, or place not being a thoroughfare, known as New Street Mews, and was also the owner of certain of the adjoining houses.

In the year 1892 the existing macadam paving was laid down by the respondent's predecessors in title to the satisfaction of the then vestry of the parish of St. Mary, Newington, in compliance with a notice under the above-mentioned section dated May 15, 1891, from the said vestry, and in accordance with a plan and specification which was previously submitted to and approved by the said vestry, whose rights, powers, duties and liabilities are now vested in the council of the metropolitan borough of Southwark, and the said mews had twice been repaired with macadam pursuant to notices served upon the respondent by the council and their predecessors.

On May 1, 1905, the appellant, on behalf of the council, served on the respondent a notice requiring him to the satisfaction of the council to pave the said place called New Street Mews with compressed asphalte on concrete.

The place called New Street Mews was at the date of the notice out of repair, and the respondent had not complied with the terms of the notice.

The respondent had expressed himself as willing to repair the macadam surface of the mews as theretofore laid, and such repairs were possible, but in the opinion of the surveyor to the council would not last sufficiently long.

It was contended on behalf of the respondent that the council had no power, under ss. 99 and 100 of the said Act (1), to do

(1) By the Metropolis Management Act, 1855, s. 98: "It shall be lawful for every vestry and district board from time to time to cause all or any of the streets within their parish or district, or any part thereof respectively, to be paved or repaired when and so often and in such form and manner and with such materials as such vestry or board think fit."

Sect. 99: "Provided always, that whenever the freehold of any court, passage or public place, not being a thoroughfare, is vested in the owner of any adjoining house, the paving of such court, passage or public

more than require the respondent to keep in repair the macadam pavement which had been laid down to the satisfaction of their predecessors, and could not insist upon a change of the class of pavement.

The magistrate upheld the respondent's contention and dismissed the information.

Avory, K.C., and *Courthope Munroe*, for the appellant. Sect. 99 of the Metropolis Management Act, 1855, is a proviso to s. 98, and, to be understood, must be read along with that section. Sect. 98 expressly provides that the vestry (now the borough council) may "from time to time cause all or any of the streets within their district . . . . to be paved . . . . when and as often . . . . and with such materials as such vestry . . . . think fit." And by s. 250 "street" includes any "court, alley, passage, whether a thoroughfare or not." Therefore if the section stopped there there would be no question but that the vestry could have this mews paved with fresh material as often as they pleased, but the expense of the work would be thrown on the general body of the ratepayers. Then s. 99 provides, with regard to a court, that if the freehold is vested in the owner of any adjoining houses he may, if the vestry think proper, be called upon to do the work at his own expense. The only effect of the proviso is to alter the incidence of the expense; it leaves the discretion of the vestry, to determine how often the work shall be done, entirely untouched. Then s. 100 enacts that where the vestry in the exercise of the unlimited discretion conferred by s. 98 call upon the owner to repave the court, the owner shall be liable to a penalty if he neglects to comply with their requirement. By s. 81 of the

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place shall be done by such owner, if deemed expedient or necessary by the vestry or district board."

Sect. 100: "The owner of any such court, passage or public place, not being a thoroughfare, shall, if required by the vestry or district board of the parish or district in which the same is situate, to the satisfaction of such vestry or district board sufficiently pave, cover the surface of, or repair the same . . . . and keep such pavement or covering . . . . in good repair to the satisfaction of such vestry or board," and in the event of his failure to do so within fourteen days after notice in writing requiring him to do it he shall be liable to a penalty.

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Metropolis Management Act, 1862 (25 & 26 Vict. c. 102), the vestry are given a further remedy against the owner in default, they may do the work themselves and recover the expenses from the owner in an action; but they are not obliged to adopt that remedy.

R. V. Bankes, for the respondent. No doubt it was in the discretion of the council to determine whether the mews should be paved. But there is nothing in the Act empowering them to insist on the owner carrying out the costly operation of paving at his own expense more than once. If, after having accepted the original paving by his predecessors as sufficiently done, they wanted it repaved with fresh material they should have done it themselves at the expense of the ratepayers. All that they could require the respondent to do was to keep the existing macadam in a proper state of repair. The construction which the appellant seeks to put upon the Act is harsh and oppressive. In *Hornsey Local Board* v. *Davis* (1) the owners of a building estate, who were the predecessors in title of the defendant, made along a certain road a sewer which was accepted by the local authority as a satisfactory sewer. The sewer not having been used as such, and having become out of repair and ruinous, the local authority gave the defendant, as the owner of land fronting on the road, notice under s. 150 of the Public Health Act, 1875, to sewer the road, and in default did the work themselves and sought to charge him with the expense. It was held that as they had once accepted the old sewer as sufficient they could not afterwards charge the defendant with the cost of making the new one. Lord Esher M.R. put it upon the ground that, the Act being capable of two constructions, they ought not to accept one which was "wholly unreasonable and oppressive."

[DARLING J. If the council are entitled to require the owner to pave a second time with new materials, there is nothing to prevent them requiring him to do so fifty times.]

Avory, K.C., in reply. The objection that it would be tyrannical and oppressive on the part of a vestry to require the owner of a court to pave it more than once is an objection that would equally apply to a decision of the vestry to pave a public

(1) [1893] 1 Q. B. 756.

street a second time. Yet it is clear the ratepayers, upon whom the cost would fall, could not insist upon the vestry repairing the existing material instead of repaving with fresh material. The answer to the objection is that the vestry, like every other public body in whom a discretion is vested, must be trusted to do its duty and to exercise its discretion in a proper and reasonable manner. Here the council would not have required the respondent to pave with asphalte unless they had thought it necessary.

LORD ALVERSTONE C.J. If I thought that the result of a judgment in favour of the respondent would be to leave it in the power of the owner to say whether this place should for all time remain paved in a particular way I should hesitate long before I affirmed the order of the magistrate, having regard to the fact that from our present decision there is no appeal, but I am clear that that would not be the result. The council, if they are anxious to carry the matter further, can themselves pave the place under s. 81 of the Act of 1862, and then bring an action to recover the expenses of so doing, and in that action the question of the liability of the owner can be carried to the Court of Appeal or to the House of Lords. Here the magistrate was acting on a summons for a penalty under s. 100, and I am not prepared to differ from him. Nor do I at all differ from Mr. Avory's contention that the right of determining how the place is to be paved rests with the council. I agree that they are the persons who have to say what is expedient to be done, and, having made up their minds as to that, they may call upon the owner to do it. But that of itself is not sufficient to entitle the appellants to succeed, because there is another principle which I have always understood to underlie these sections, that when the public authority have once made a requirement of this kind which has been carried out to their satisfaction they are not entitled to make it again. Now, in the year 1891 the predecessors in title of the respondent had been called upon by the vestry to pave and cover the surface of the mews to the satisfaction of their surveyor, and they did the work in obedience to the notice, and later on, in obedience to further notices, they

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twice repaired the surface. Under those circumstances, what is the obligation which must be broken to render the respondent liable to a penalty? The words of the section are, "shall, if required by the vestry or district board . . . . sufficiently pave, cover the surface of, or repair the same . . . . and keep such pavement or covering . . . . in good repair to the satisfaction of such vestry or board." The owner may be called upon to pave and also to repair such pavement. His predecessors had discharged the first obligation, and he has expressed his willingness to discharge the second. As at present advised, I do not think he can be called upon to discharge the first obligation, that of paving, a second time with a different material. If, however, I am wrong in this view and the appellants desire to raise the question they must, as I have already said, do so by proceeding under s. 81 of the later Act, by which means the question can be litigated before a higher tribunal.

RIDLEY and DARLING JJ. concurred.

Appeal dismissed.

Solicitor for appellants: *G. C. Topham.*
Solicitors for respondent: *Meynell & Pemberton.*

J. F. C.

GIEBLER, Appellant; MANNING, Respondent. 1906 *April* 2.

Public Health—Offence—Unsound Meat—Information by Sanitary Inspector—Necessity for Authority—Right of private Person to prosecute—Public Health (London) Act, 1891 (54 & 55 *Vict. c.* 76), *s.* 47, *sub-s.* 2; *s.* 107, *sub-s.* 3; *s.* 123.

The respondent, a sanitary inspector of a borough council, entered the premises of the appellant, a butcher, and seized certain meat, which was then taken before a magistrate and by him condemned as unsound and ordered to be destroyed. On the same day a summons was issued on an information laid by the respondent under s. 47, sub-s. 2, of the Public Health (London) Act, 1891, charging the appellant with having the meat in his possession for the purpose of sale. Both the information and the summons stated that the respondent was acting on behalf of the borough council, but he had not been expressly authorized by the council to take proceedings against the appellant. The appellant was convicted:—

Held, affirming the conviction, that a private person can prosecute for an offence under s. 47, sub-s. 2, and that the absence of authority on the part of the respondent did not invalidate the proceedings, the words "on behalf of" the borough council in the information and summons being mere surplusage.

Allman v. *Hardcastle*, (1903) 2 L. G. R. 13, followed.

Case stated by a metropolitan police magistrate.

The facts proved or admitted were as follows:—

The appellant was a pork and beef butcher, carrying on business at No. 596, King's Road, Fulham. The respondent was a sanitary inspector of the Fulham Borough Council. On March 23, 1905, about noon, the respondent visited the appellant's premises, and found there certain meat, which he seized. On the same day at 2.30 p.m. the meat was brought before the magistrate. The medical officer of health for the Fulham Borough Council examined the meat at the court, and was of opinion that it was unfit for food. The magistrate condemned the meat and ordered that it should be destroyed. During the same afternoon a summons was issued, on the information of the respondent on behalf of the Fulham Borough Council, under s. 47, sub-s. 2, of the Public Health (London) Act, 1891 (1), alleging that

(1) Public Health (London) Act, 1891 (54 & 55 Vict. c. 76):—

Sect. 47: "(1.) Any medical officer of health or sanitary inspector may at all reasonable times enter any premises and inspect and examine—(*a*) Any animal intended for the food of man which is exposed for sale or

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on March 23, 1905, the appellant did deposit for the purpose of sale or of preparation for sale, or had in his possession or on his premises for that purpose, at No. 596, King's Road, Fulham, certain articles of food intended for the food of man, to wit, 5 lbs. of meat, which was on March 23, 1905, lawfully seized by the respondent, the said meat appearing to him at the time of

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deposited in any place for the purpose of sale, or of preparation for sale . . . . and if any such animal . . . . appears to such medical officer or inspector to be diseased, or unsound, or unwholesome, or unfit for the food of man, he may seize and carry away the same himself or by an assistant, in order to have the same dealt with by a justice."

"(2.) If it appears to a justice that any animal . . . . which has been seized or is liable to be seized under this section is diseased, or unsound, or unwholesome, or unfit for the food of man, he shall condemn the same, and order it to be destroyed or so disposed of as to prevent it from being exposed for sale or used for the food of man; and the person to whom the same belongs or did belong at the time of sale or exposure for sale, or deposit for the purpose of sale or of preparation for sale, or in whose possession or on whose premises the same was found, shall be liable on summary conviction to a fine not exceeding fifty pounds for every animal . . . . so condemned, or, at the discretion of the Court, without the infliction of a fine, to imprisonment for a term of not more than six months with or without hard labour."

Sect. 107: "(3.) The sanitary inspectors shall report to the sanitary authority the existence of any nuisances; and the sanitary authority shall cause a book to be kept in which shall be entered all complaints made of any infringement of the provisions of this Act or of any by-laws made thereunder, or of nuisances; and every such inspector shall forthwith inquire into the truth or otherwise of such complaints, and report upon the same, and such report shall be laid before the sanitary authority at their next meeting, and together with the order of the sanitary authority thereon shall be entered in a book, which shall be kept at their office, and shall be open at all reasonable times to the inspection of any inhabitant of the district, and of any officer either generally or specially authorized for the purpose by the county council; and it shall be the duty of such inspector, subject to the direction of the sanitary authority, or of a committee thereof, to make complaints before justices and take legal proceedings for the punishment of any person for any offence under this Act or any such by-laws."

Sect. 123: "The county council or a sanitary authority may appear before any Court or in any legal proceeding by their clerk, or by any officer or member authorized generally or in respect of any special proceeding by resolution of such council or authority; and their clerk, or any officer or member so authorized, shall be at liberty to institute and carry on any proceeding which the county council or sanitary authority are authorized to institute and carry on under this Act."

the seizure to be unsound, unwholesome, and unfit for the food of man; and that the meat was in due course of law adjudged by the magistrate to be unsound, unwholesome, and unfit for the food of man, and ordered by him to be destroyed.

It appeared on the face of the summons, and it was the fact, that the information was laid by and the summons was issued to the respondent expressly on behalf of the Fulham Borough Council.

After the issue of the summons the respondent informed the clerk, who was also the solicitor to the council, of all the facts, and handed over the summons to him. From this point the latter took the matter into his own hands, and appeared for the council at the hearing. So far every step had been taken in strict accordance with the invariable course of business and method of procedure adopted by the sanitary authority in similar cases under s. 47. But the respondent, before applying for the summons, did not report the facts to the council or any committee appointed by them. He had never received any express authority by resolution or in writing, general or special, from the council or any such committee authorizing him to make complaints or take proceedings on their behalf. On the hearing of the summons the magistrate was satisfied that the appellant had been guilty of the offence alleged; but it was contended on his behalf that under s. 107, sub-s. 3, of the Public Health (London) Act, 1891, for the purposes of and as a condition precedent to a prosecution on behalf of a sanitary authority by a sanitary inspector under s. 47 it was necessary that the inspector should report the alleged offence against the provisions of the Act to the sanitary authority, by whom he was appointed; that the authority should consider his report, and should direct or authorize the inspector to apply for a summons and act as prosecutor against the alleged offender under the Act. No report was made by the respondent, nor did the council or any committee thereof expressly direct or authorize the respondent to make the complaint and take the proceedings.

The magistrate was of opinion that the reports required by s. 107, sub-s. 3, were confined to—(*a*) nuisances discovered by the inspectors themselves under s. 1 and numerous other sections;

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(*b*) inquiries by them into complaints of nuisances and offences against the statute and the statutory by-laws made by private individuals under (among others) ss. 3 and 21. Of necessity, and as stated in evidence at the hearing, these two classes of reports were always made, and, as a fact, consequent process was always applied for by the council's solicitor. The offence in the present summons did not appear to fall into either class. But even if it did, the language of the section, "subject to the direction of the council," was, the magistrate thought, capable at least of meaning such direction as it might choose to give; but, however that might be, there was nothing in the language of s. 107, sub-s. 3, or, as regards committees, s. 99, sub-s. 4, compelling the authority to give directions in any particular form or manner, and, if so, the magistrate thought that the course of business adopted by the council and committees as above stated might well justify the action of the respondent as resting on an implied direction and authority or ratification. Accordingly the magistrate convicted the appellant.

The question for the opinion of the Court was whether the opinion the magistrate formed was right in law, and whether the magistrate ought to have convicted the appellant on the summons or not.

The magistrate added a note to the case, in which he stated that the whole contention for the appellant at the hearing was founded on s. 107, sub-s. 3, and that his attention was not called to s. 123, which he came upon in stating the case, and that he would have found considerable difficulty in reconciling that provision with the conclusion he arrived at on s. 107 standing alone.

Clarke Hall, for the appellant. The effect of s. 107, sub-s. 3, and s. 123 of the Public Health (London) Act, 1891, is that before a sanitary inspector can institute proceedings on behalf of a sanitary authority in respect of an offence under s. 47, sub-s. 2, of the Act he must first make a report and then receive authority to do so by a resolution of the sanitary authority or of a committee appointed under s. 99. Unless those sections are complied with the inspector does not

get the benefit of the protection afforded by s. 124. There is no case decided under this Act on the point, but the Act is the legal descendant of the Nuisances Removal Act, 1855, the language of s. 5 of that Act being very similar to that of s. 99, sub-s. 4, of this Act; and in *Isle of Wight Ferry Co.* v. *Ryde Commissioners* (1) it was held that under s. 5 there must be an order in writing in each particular case from the local authority or committee to their officer to make a complaint, and that a previous general authority was not sufficient. Applying that decision to this case, the magistrate was wrong in holding that an implied authority arising from the course of business was sufficient.

Danckwerts, K.C. (*Jeeves* with him), for the respondent. In respect of certain offences under the Public Health (London) Act, 1891—for example, those dealt with by ss. 2 to 5—it is expressly provided that proceedings can only be instituted by the sanitary authority, and in those cases a sanitary inspector could not act as prosecutor on behalf of the sanitary authority unless he was expressly authorized under s. 123 to do so. With regard to unsound meat, only medical officers and sanitary inspectors can enter premises and seize meat and procure its condemnation under s. 47, sub-s. 1; but there is no restriction as to the persons who can take proceedings in respect of an offence under sub-s. 2 of s. 47, and, the offence being one against public policy, any private person can prosecute: *Reg.* v. *Stewart* (2); *Back* v. *Holmes* (3); *Cole* v. *Coulton* (4); *Worthington* v. *Kyme*. (5) The question whether the respondent was authorized by the borough council to apply for this summons is therefore immaterial; nor does it make any difference that the information and summons contain the words "on behalf of the Fulham Borough Council," for those words are mere surplusage and can be disregarded: *Allman* v. *Hardcastle*. (6)

[He was stopped by the Court.]

Clarke Hall, in reply. These proceedings purport throughout to have been taken on behalf of the borough council, and they cannot now be justified on the ground that a private person

(1) (1861) 25 J. P. 454.
(2) [1896] 1 Q. B. 300.
(3) (1887) 57 L. J. (M.C.) 37.
(4) (1860) 29 L. J. (M.C.) 125.
(5) (1905) 3 L. G. R. 1098.
(6) 2 L. G. R. 13.

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might have laid the information. If the view of the respondent is correct, a sanitary authority could always permit proceedings to be taken by an inspector on their behalf, and, in the event of their being unsuccessful, could resist liability for the payment of costs by saying that the inspector was merely acting in his capacity of a private individual. But it is submitted that a private person cannot institute proceedings under s. 47, sub-s. 2.

The provisions of sub-s. 1 of s. 47 as to the entry of premises and seizure of diseased meat and the obtaining an order of condemnation admittedly can only be put in force by a medical officer or a sanitary inspector. The condemnation is a condition precedent to a conviction under sub-s. 2, and it follows that since a private person cannot proceed under sub-s. 1, neither can he do so under sub-s. 2.

LORD ALVERSTONE C.J. In my opinion this appeal fails, for I think that the question is covered by authority. The important question in the case is, Can a private person take proceedings under s. 47, sub-s. 2, of the Public Health (London) Act, 1891? I agree that as to part of s. 47 it only operates to give authority to certain named persons, medical officers of health and sanitary inspectors, and I agree also that their duties under the section are hedged round with provisions for the protection of the rate-payers, and of the local authority who are or may be the principals of the medical officer or sanitary inspector. Further, it is in my judgment quite clear that if a sanitary authority are going to delegate their authority to take proceedings to a particular officer they must do so by virtue of a resolution under s. 123, and if a committee intend to empower an officer to take proceedings on their behalf, they must do so in accordance with the provisions of s. 99. Therefore, for the purpose of considering who is liable for costs, and as to whether any particular proceedings have been taken on behalf of the sanitary authority, those provisions are of very great importance; but, on the broad ground taken by Mr. Danckwerts, they seem to me to be beside the point in this case. I therefore come back to the main question, Can a private person institute proceedings under s. 47, sub-s. 2? Apart from express provisions limiting the right, I should have thought the point

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was too clear for argument. [His Lordship read the section.] It is contended that the only persons who can take proceedings under sub-s. 2 of s. 47 are medical officers and sanitary inspectors. In support of this view reliance is placed on the words at the commencement of sub-s. 1, but it seems to me that that argument goes a great deal too far. Having regard to the object of the statute, the protection of the public against the offering of diseased meat for sale, I think that if it had been intended to limit the right to take proceedings for the recovery of penalties to a limited class of persons, such as medical officers and sanitary inspectors, words would have been introduced into the section taking away from private persons the right to lay informations under the section. For the reasons which were given in the cases which have been referred to, one of which is *Back* v. *Holmes* (1), I think that a private person can lay an information in respect of an offence under s. 47, sub-s. 2. Then it is said that in the present case the information was not laid by the sanitary inspector as a private individual, because it is expressly stated to have been laid by him on behalf of the Fulham Borough Council. That point is covered by the decision of this Court in *Allman* v. *Hardcastle*. (2) In that case an information with regard to the obstruction of a street had been laid by the appellant on behalf of the Southwark Borough Council. It was contended that the council had no authority to take the proceedings, which ought to have been taken by the police. It was held that the words "on behalf of the Southwark Borough Council" could be rejected as a surplusage because the appellant was himself entitled to lay the information. It has been argued that there is a hardship in allowing a summons to be issued on behalf of a borough council when in fact the person laying the information has not authority from the council to do so. Except as to the question of costs I cannot see that there is anything in that argument. It may be the case that if the summons were dismissed it might appear that costs could not be recovered from the council, but if it had been intended that the right of an individual to lay an information under this section was to depend on his ability to pay costs, the Legislature would have

(1) 57 L. J. (M.C.) 37. (2) 2 L. G. R. 13.

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dealt with the matter on that footing. It has not done so, however; and, since there is nothing in this section taking away from private persons the right to lay informations or confining that right to the persons mentioned in sub-s. 1, I cannot agree with the contention that the proceedings are rendered bad ab initio by reason of the respondent not having the express authority of the borough council.

The case of *Isle of Wight Ferry Co.* v. *Ryde Commissioners* (1), to which we have been referred, was a very different case. In that case there had been an obstruction of the foreshore, and it was contended, and the Court held rightly contended, that before an officer of the local authority could take proceedings for a nuisance of that sort he must have received authority from the local authority to do so. The case did not turn on a statute of the same character as that with which we are now dealing, and the question whether a private person could take proceedings in respect of a nuisance was not raised.

For these reasons I think that the respondent was entitled as a private individual to lay an information and to obtain a summons, and, whatever would have been the liability which he would have incurred for costs if the proceedings had been unsuccessful, the fact that the sanitary authority are protected by s. 124 is not sufficient to compel us to hold that the respondent ought not to have instituted the proceedings.

I ought to point out that the point on which we are deciding was not taken before the magistrate, but this Court has invariably taken the view in this class of cases that where on the facts found in the case the proceedings are regular, they ought to be supported, even though the particular point on which the judgment of this Court is based was not raised in the Court below.

For these reasons I am of opinion that this appeal must be dismissed.

DARLING J. When this case was stated by the magistrate the question that it was desired to have decided was whether the respondent had been duly authorized by the Fulham Borough Council under s. 107 of the Public Health Act (London), 1891, to take proceedings against the appellant for an offence under s. 47,

(1) 25 J. P. 454.

sub-s. 2, of the Act. When stating the case the magistrate came to the conclusion that s. 123, which had not been called to his attention at the hearing, put the respondent out of Court, because that section provides that any officer of the authority, other than its clerk, shall be authorized by resolution before instituting proceedings on its behalf, and that requirement had not in this case been complied with. It was thought, apparently, by counsel for the respondent that that section raised a difficulty, for, instead, of arguing that point, it was contended that the respondent was entitled to institute the proceedings as a private individual. I quite agree with my Lord, and I have nothing to add to what he has said, that it was open to the respondent to take these proceedings as a private individual. But I do not think that he, in fact, did proceed as a private individual: he certainly did not affect to do so; he purported to act as an officer of the Fulham Borough Council, for he stated in his information, and it appears on the face of the summons, that he took the proceedings on behalf of the Fulham Borough Council. I might have come to the conclusion that the appellant was entitled to succeed here if it had not been for the words used by my Lord in his judgment in the case of *Allman* v. *Hardcastle*. (1) He there decided, and my brothers Wills and Channell agreed with him, that you can give the go-by to these words "on behalf of" and treat the summons—which on its face professed to be a summons taken out by an officer of a public body on behalf of that public body, as well it might be—as a summons taken out by him as a private individual. Having regard to that decision I agree with the result at which this Court arrives, viz., that the appeal must be dismissed. I wish to add that I do not regard this as a mere point of procedure, because it does seem to me to be a very dangerous thing that a person in the position of the respondent should be able to take proceedings without being authorized, affect to act on behalf of the Fulham Borough Council, and, if it turns out that he has not got the authority, that the council will not be liable in costs, and the person against whom he has taken the proceedings will only have the respondent, the private individual, to look to.

(1) 2 L. G. R. 13.

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BRAY J. The first point we have to deal with is whether a private individual can take proceedings under sub-s. 2 of s. 47. I am of opinion that he can. The strength of Mr. Clarke Hall's argument was that the proceedings under sub-s. 1 can only be taken by a medical officer of health or a sanitary inspector, and he contended that, notwithstanding the general words in sub-s. 2, we ought to come to the conclusion that it was only open to the medical officer or the sanitary inspector to take proceedings under those sub-sections. The language of sub-s. 2 is perfectly general, "If it appears to a justice"—not "on the information of such medical officer or sanitary inspector," for there are no such words—"that any animal or article which has been seized": if it stood there, there might be more in the contention; but the sub-section goes on, "or is liable to be seized under this section is diseased." In other words, the proceedings may be taken although there has been no seizure under sub-s. 1. It is impossible to ignore the perfectly general language of that sub-section, and I do not think one has any right to insert the words "on the information or complaint of such medical officer of health or sanitary inspector." I am supported in that view by the equally general words in sub-s. 3, where it says, "Any article liable to be seized under this section." In my opinion, therefore, any individual can take these proceedings. Then the question arises as to whether, inasmuch as the respondent clearly purported to take these proceedings on behalf of the borough council, he can now contend that, for the purpose of these proceedings, he must be regarded as a private individual. In my opinion that point is concluded by *Allman* v. *Hardcastle* (1), in which my Lord used these words: "It seems to me that these words"—they are practically the same—"'on behalf of the Southwark Borough Council' are absolutely unnecessary and can be disregarded." I am of opinion that that decision is binding on us and is decisive of this appeal.

Appeal dismissed.

Solicitors for appellant: *W. T. Ricketts & Son.*
Solicitor for respondent: *R. M. Prescott.*

(1) 2 L. G. R. 13.

F. O. R.

THE KING *v.* CABLE.

1906
April 5.

Criminal Law—Conviction—Cruelty to Animals—One act—Several Animals—Cruelty to Animals Act, 1849 (12 & 13 *Vict. c.* 92), *s.* 2.

A conviction for an offence under s. 2 of the Cruelty to Animals Act, 1849, stated that the defendant was convicted for that he did cruelly ill-treat, abuse and torture five cows by causing them to be over-stocked with milk. On an objection being taken that the conviction was bad on its face in that it was a conviction for five separate and distinct offences:—

Held, that an act or omission affecting several animals may constitute one offence under s. 2, and that the conviction was not bad on its face.

RULE nisi to justices of the borough of Guildford to shew cause why a writ of certiorari should not issue to bring up a certain conviction in order that the same might be quashed.

The conviction was in the following terms:—"In the Borough of Guildford. Before the Court of Summary Jurisdiction sitting at Guildford. The thirtieth day of October, 1905. Con O'Shea, of Newmarket, County Cork (hereinafter called the defendant), is this day convicted for that he on the tenth day of October, 1905, at the Parish of Christ Church in the Borough aforesaid, did cruelly ill-treat, abuse and torture five cows by causing the same to be over-stocked with milk contrary to the form of the statute in such case made and provided. And it is adjudged that the defendant for his said offence do forfeit and pay to the clerk of this Court the sum of forty shillings, and do also pay to him the sum of ten shillings and sixpence for costs forthwith."

The rule nisi was moved for and granted on the ground that the conviction was bad on the face of it, in that it was a conviction for five separate and distinct offences.

Colam, shewed cause against the rule. The conviction is good. Sect. 29 of the Cruelty to Animals Act, 1849, provides that words denoting the singular number are to include the plural, and, therefore, the offence created by s. 2 is not confined to acts of cruelty to one animal only. If there is one act of cruelty affecting several animals it may be dealt with as one

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offence. In certain cases—as, for example, cruelty to a flock of sheep by over-driving them—it would be almost impossible to prove the offence if it was necessary to treat the case as involving a separate offence with respect to each sheep. So in the present case, although there were five cows there was only one act of cruelty, namely, the abstaining from milking them. *Reg.* v. *Totnes Justices* (1) is an authority for the proposition that an information alleging cruelty to more than one animal is good. There have been many cases in which this course has been followed: *Murphy* v. *Manning* (2); *Lewis* v. *Fermor* (3); *Ford* v. *Wiley* (4); and in none of those cases was it suggested that the inclusion of several animals in one charge invalidated the proceedings. [He also referred to *Reg.* v. *Scott* (5) and *In re Hartley.* (6)]

Scholefield, in support of the rule. The proper test to apply in order to ascertain whether the conviction is good is to ask whether it refers to one offence or to more than one: *Milnes* v. *Bale.* (7) It is clear that it refers to five offences, because there were five cows, and there was a separate and distinct act of cruelty with regard to each cow. It is not disputed that proceedings might have been taken with regard to one cow only, but on that charge evidence could not have been given that four other cows had been over-stocked. Again, if five offences can be charged as one offence, only one penalty can be imposed, whereas the Act provides that a penalty is to be imposed for each offence: *Ex parte Beal.* (8) In *Reg.* v. *Totnes Justices* (1) the question was as to whether an information, which charged the defendants with having cruelly beaten, ill-treated, abused and tortured two heifers, was bad, it being contended that each of these four words constituted a separate offence. The point that the information was also bad because it referred to two heifers does not appear to have been taken, and the decision is, therefore, not an authority in the present case.

(1) Times newspaper, May 9, 1879; cited in 56 J. P. at p. 455. According to the record of the case in the Crown Office, its correct title is *Reg.* v. *Justices of Devonshire.*

(2) (1877) 2 Ex. D. 307.

(3) (1887) 18 Q. B. D. 532.

(4) (1889) 23 Q. B. D. 203.

(5) (1863) 27 J. P. 420.

(6) (1862) 31 L. J. (M.C.) 232.

(7) (1875) L. R. 10 C. P. 591.

(8) (1868) L. R. 3 Q. B. 387.

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LORD ALVERSTONE C.J. In this case the defendant was charged with an offence under s. 2 of the Cruelty to Animals Act, 1849, which provides that "if any person shall . . . . cruelly beat, ill-treat, over-drive, abuse or torture . . . . any animal," he shall be liable to a penalty. The particular offence which was alleged against the defendant, and of which he was convicted, was that he did cruelly ill-treat, abuse and torture five cows by causing them to be over-stocked with milk.

It is not immaterial to point out (although having regard to the Interpretation of Statutes Act, 1889, it may not be very important) that by s. 29 of the Act of 1849, words dealing with the singular number are to include the plural; that does seem to shew that it was thought necessary to give power in the Act of 1849 to deal with cases involving cruelty to a number of animals, as, for example, a flock of sheep. It would, in my opinion, be a very unfortunate view of the law if in a case of this sort it were necessary to take out a separate summons in respect of each animal, and it might put the prosecution to very great difficulty in the way of proof. But, while I take this view, I desire to say that I have no doubt that separate summonses may be taken out in respect of each animal alleged to have been ill-treated. It is contended that the conviction in this case is bad on the face of it because it refers to cruelty to five cows, which, it is said, necessarily involves five separate offences. In my opinion the case of *Reg.* v. *Totnes Justices* (1) is indirectly an authority of this Court for the view that this conviction is good.

On referring to the papers in that case, which I have obtained from the Crown Office, I find that there a summons had been obtained against the defendants for cruelty to two heifers by over-driving them. At the hearing objection was taken on behalf of the defendant that the information was bad, inasmuch as it charged the defendants with four offences, namely, that they did unlawfully and cruelly ill-treat, over-drive, abuse and torture certain animals, to wit, two heifers. It was contended at the hearing before the justices that each of these words constituted a separate offence, and that the

(1) Times newspaper, May 9, 1879.

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Lord Alverstone C.J.

information was, therefore, bad. The justices upheld the objection, and dismissed the summons. A rule nisi for a mandamus to the justices to hear and determine the summons was moved for in this Court and was granted, and the rule was subsequently made absolute: that is to say, in a case in which it appeared on the face of the information that cruelty to two heifers was alleged, this Court came to the conclusion that the case was one which the justices ought to have heard and determined. My attention has been called to the fact that in *Reg.* v. *Totnes Justices* (1) the objection that the information was bad on the ground that it alleged the offence with respect to two heifers was not taken. This appears to be so, nevertheless there is a judgment of this Court that an information for an offence against two animals was good, in a case in which objections to the form of the information were being considered by the Court.

I am also of opinion that it cannot be said that this conviction does necessarily relate to five separate offences, because, although there were five cows, I think the conviction is open to the construction that it was only one act which caused the cows to be over-stocked. There has been a long series of similar cases, extending over many years, in which the same practice has been followed. In *Murphy* v. *Manning* (2) there was an information for cutting the combs of three cocks; *Lewis* v. *Fermor* (3) was a prosecution for cruelty to five sows; and in *Ford* v. *Wiley* (4) there were two informations, one charging cruelty to sixteen oxen on one date and the other cruelty to sixteen oxen on another date. It is true that in none of these cases was the point taken, but it is curious that, if the point is a good one, it should not have been raised in any of these cases. I think therefore that by the implied authority of this Court the decisions are against the contention that this conviction is bad because it refers to five cows.

For these reasons I am of opinion that this rule must be discharged.

DARLING J. I am of the same opinion. I think that there is a good deal to be said in favour of the view that this conviction

(1) Times newspaper, May 9, 1879.
(2) 2 Ex. D. 307.
(3) 18 Q. B. D. 532.
(4) 23 Q. B. D. 203.

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is bad in form, and if the question came before the Court for the first time I should have had some difficulty in deciding against that view, but it appears to me that the question is concluded by the case to which my Lord has referred. I should have been sorry to have had to come to a different conclusion, for the point is a purely technical one, with no merits in it whatever. It is said that the conviction refers to five different acts of cruelty because there were five cows. In one sense, there was only one act, namely, the act of locking up the cows and not milking them, though it may be said that although there was only one act, yet that one act involved five separate and distinct offences because it inflicted pain and suffering on five cows. Now, in *Ford* v. *Wiley* (1), the dishorning case, there were two informations, each dealing with sixteen oxen, and there was a separate act of alleged cruelty performed with regard to each animal, so that if there is anything in the argument the point could have been taken in that case with even greater effect than here. The point, however, was not taken.

BRAY J. I am of the same opinion, and I only desire to say that I should have come to the same conclusion if there had been no authority on the point.

Rule discharged.

Solicitor for prosecution: *S. G. Polhill.*

Solicitors for defendant: *Baker & Co., for W. M. Maud, Guildford.*

(1) 23 Q. B. D. 203.

F. O. R.

1906
April 7.

WALKER and Others *v.* YORK CORPORATION.

Highway—Diversion—Certificate of Justices—Appeal to Quarter Sessions—Party Injured or Aggrieved—Findings of Jury—Statute—Contradictory Terms—Construction—Substitution of "and" for "or"—Highway Act, 1835 (5 & 6 *Will.* 4, *c.* 50), *s.* 89.

In construing a statute "or" may be read as "and" if the context makes that the necessary meaning.

Sect. 89 of the Highway Act, 1835, provides that if, on an appeal to quarter sessions under s. 88 by a person who thinks that he will be injured or aggrieved by a proposed diversion of a highway, the jury find that the proposed new highway is more commodious to the public, *or* that the party appealing would not be injured or aggrieved, the Court shall dismiss the appeal, but that if the jury find that the proposed new highway is not more commodious or that the party appealing would be injured or aggrieved, the Court shall allow the appeal. A jury at quarter sessions found (1.) that a proposed new highway would be more commodious to the public, (2.) that the party appealing would be injured or aggrieved if the existing highway were stopped up and the proposed new one substituted:—

Held, that s. 89 was contradictory and could only be construed by reading the word "or" in the first part of the section as "and," and that on the findings of the jury the appeal to quarter sessions must be allowed.

Special case stated by the Recorder of York.

Two justices having certified, under s. 85 of the Highway Act, 1835, that they had viewed a certain public footpath which the respondents, the surveyors of highways for the city of York, proposed to stop up, and also the line of a new public highway, a footpath proposed to be made in lieu thereof, and that upon such view they found that the new footpath would be more commodious to the public than the footpath which it was proposed to stop up, the appellants, thinking that they would be injured or aggrieved if the existing footpath should be ordered to be diverted, made their complaint thereof by appeal to quarter sessions under s. 88 of the Act.

The appeal was tried before the recorder and a jury, and evidence was given on behalf of the appellants that they were owners of land adjoining the footpath proposed to be stopped up, and that the proposed diversion would injure the value of their

land. Evidence was given on behalf of the respondents that no such damage as alleged would be caused to the appellants, and that the new footpath would be a highway of a better kind than the one proposed to be stopped up.

The recorder left two questions to the jury, under s. 89 of the Act (1), namely: (1.) Whether the proposed new highway was more commodious to the public than the existing one; (2.) whether the appellants would be injured or aggrieved if the existing highway were stopped up as proposed and a new one substituted.

The jury answered both questions in the affirmative.

After argument as to the effect of these findings, the recorder came to the conclusion that, having regard to the dicta of Abbott C.J. in *Rex* v. *Essex Justices* (2), the intention of the Legislature was that the persons appealing must, in order to give themselves a locus standi to be heard, first shew that they are injured or aggrieved, and that, when they have succeeded in this, the Court of quarter sessions will proceed to inquire into the question whether the proposed new highway is nearer or more commodious. In the present case, the appellants having established their locus standi to give them a right to be heard, and the jury having found against them that the proposed new highway was more commodious, the recorder dismissed the appeal with costs against the appellants.

The question for the opinion of the Court was whether the recorder was right or wrong in the conclusion he arrived at as to the construction of s. 89 of the Highway Act, 1835, as applicable to the findings of the jury.

(1) Highway Act, 1835 (5 & 6 Will. 4, c. 50), s. 89: "In case of such appeal the justices at the said quarter sessions shall, for the purpose of determining whether the proposed new highway is nearer or more commodious to the public . . . . or whether the said party appealing would be injured or aggrieved, impannel a jury of twelve disinterested men . . . . and if, after hearing the evidence produced before them, the said jury shall return a verdict that the proposed new highway is nearer or more commodious to the public . . . . or that the party appealing would not be injured or aggrieved, then the said Court of quarter sessions shall dismiss such appeal . . . .; but if the said jury shall return a verdict that the proposed new highway is not nearer or not more commodious to the public . . . . or that the party appealing would be injured or aggrieved, then the said Court of quarter sessions shall allow such appeal. . . . ."

(2) (1826) 5 B. & C. 431.

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Jenkin, for the appellants. On the findings of the jury the appeal ought to have been allowed. The language of s. 89 is contradictory, and the only way to give effect to it is by construing it according to the language of the latter part, that is to say, if the jury find either that the proposed new road is not more commodious to the public or that the party appealing is a person aggrieved, then the appeal must be allowed. It cannot have been intended that, if the jury found that the new road would not be more commodious, but that the party appealing was not a person aggrieved, the appeal must be dismissed. That result would, however, follow if the word "or" in the first part of the section is read conjunctively. It should be read disjunctively. The recorder relied on certain dicta in *Rex* v. *Essex Justices* (1), but that case was decided under the Highway Act, 1815, which did not provide for specific questions to be left to the jury as is done in s. 89, and the decision has no application to the circumstances of this case.

S. G. Lushington, for the respondents. It cannot be denied that the language of the section is contradictory, and it is difficult to see how, on the finding of the jury that the appellants are aggrieved persons, the certificate of the justices can be upheld. The Legislature appears to have noticed the difficulty which might arise, because in s. 64 of the Inclosure Act, 1845, the language of which is practically identical with that of s. 89 of the Highway Act, the word "and" has been substituted in the earlier part of the section for the word "or," and this alteration gets rid of the difficulty. In *Mersey Docks and Harbour Board* v. *Henderson* (2) Lord Halsbury pointed out that in construing an Act of Parliament, "or" may be read as "and" if that is necessary to make sense of the enactment.

RIDLEY J. We are of opinion that this appeal must be allowed. The question arises on an appeal to quarter sessions under s. 89 of the Highway Act, 1835. The jury have found on the questions left to them that the proposed new road was more commodious to the public, and they have also found that the appellants were parties who would be injured or aggrieved if the existing

(1) 5 B. & C. 431.

(2) (1888) 13 App. Cas. 595, at p. 603.

highway were diverted and the new one substituted. The learned recorder, on the authority of certain dicta in *Rex* v. *Essex Justices* (1), came to the conclusion that the intention of the Legislature was that the persons appealing must, in order to give themselves a locus standi to be heard, first prove that they were injured or aggrieved, and then, if that were so found, the further question would have to be determined as to whether the proposed new road was nearer or more commodious to the public. We do not agree with that reasoning. The case referred to was decided under the Highway Act of 1815, the provisions of which are not the same as those of s. 89 of the Act of 1835. Nor does it appear that there is anything in the judgment of the Court in that case which applies to the point which we have to decide as to the meaning of s. 89. I think that it is true that the words of s. 89 are contradictory. The section first provides that if the jury return a verdict that the proposed new highway is nearer or more commodious, or that the party appealing would not be injured or aggrieved, then the appeal is to be dismissed. It was contended before the recorder that, the jury having found that the new road was nearer or more commodious, the appeal must be dismissed; and if the section stopped there, that would, I suppose, be the necessary result; but it is, I think, clear that that was not the intention of the section, if the latter part of the section is read, for there the converse case is dealt with, in which the finding of the jury is the other way. The section there says that if the jury shall return a verdict that the proposed new highway is not nearer or more commodious, *or* that the party appealing would be aggrieved or injured, then the appeal shall be allowed. In the present case the jury have found that the appellants would be injured or aggrieved, and we are of opinion that on that finding the Court of quarter sessions should have allowed the appeal. If any doubt existed on the point, it is, I think, removed by s. 64 of the Inclosure Act, 1845, to which Mr. Lushington has very properly referred us, though it is fatal to the contention of his clients. The language of that section is almost identical with that of s. 89 of the Highway Act, 1835, except that in the first branch of s. 64 the word "and"

(1) 5 B. & C. 431.

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has been substituted for the word "or" in the first part of s. 89.

DARLING J. I am of the same opinion. It is impossible to read s. 89 without seeing that the two parts of the section are irreconcilable—in fact, they are mutually contradictory. It is plain, however, that what was meant was that the appeal to quarter sessions should fail if the new road was more commodious than the old, *and* if the appellant were not a person injured or aggrieved. But if the new road was not more commodious, *or* if the appellant was aggrieved, then the appeal was to succeed. That is the only way in which the section can be read so as to do justice, and that reading follows the language of the latter half of the section. The case comes within the words used by Lord Halsbury in *Mersey Docks and Harbour Board* v. *Henderson* (1), where he said that in construing a statute "or" could be turned into "and," if the context made that the necessary meaning.

The point also seems to be made absolutely clear by the language of s. 64 of the Inclosure Act, 1845.

BRAY J. I am of the same opinion. There is an obvious mistake in the earlier part of the section, for on the grammatical construction of the language, if a jury found that the new road was not more commodious, and that the appellant was not aggrieved, it would follow that the appeal must be dismissed. That reduces it to an absurdity. It is quite plain that the latter part of the section must prevail.

Appeal allowed.

Solicitors for appellants: *Ridsdale & Son, for Geo. Crombie & Sons, York.*

Solicitors for respondents: *Bell, Brodrick & Gray, for Holtby & Procter, York.*

(1) 13 App. Cas. 595, at p. 603.

F. O. R.

END OF VOL. I.

The Mode of Citation of the Volumes of the *Law Reports*, commencing January 1st, 1906, will be as follows:—

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Where the East India Company, as representing the Crown, has done acts of such a nature, and under such circumstances, as to lead to the conclusion that those acts were done in the exercise of supreme power, as acts of State, and to negative any intention to give thereby legal rights, whether contractual or otherwise, to an individual or individuals as against the Company, the municipal Courts have no jurisdiction to question the validity of those acts, or to entertain any claim in respect thereof by an individual against the Secretary of State for India, as the successor of the East India Company.

So *held* by the Court of Appeal (Vaughan Williams L.J., Stirling L.J., and Fletcher Moulton L.J.).

By Fletcher Moulton L.J.: Although an act of State cannot be challenged, controlled, or interfered with by municipal Courts, *semble*, its intention and effect may sometimes be to modify and create rights as between the Government and individuals who are, or who are about to become, subjects of the Government, and in such cases the rights arising therefrom may be capable

ACT OF STATE—*continued.*

of being adjudicated upon by the municipal Courts.

The East India Company, as representing the Crown, annexed the territory of a native State, and confiscated the State property, granting to the Maharajah, the ruler of the State, who was then an infant, a pension for life. The Company also assumed the custody of his person during his minority, and took possession of his private property. An action having been brought after his death by the trustee in bankruptcy of his residuary legatee against the Secretary of State for India, as the successor of the East India Company, for arrears of the pension, and for an account of the private property, alleging that the Company had undertaken the legal obligations of guardians of and trustees for the Maharajah in respect thereof:—

Held (Fletcher Moulton L.J. dissenting as to the claim in respect of the private property) that, under the circumstances, the acts done by the Company as aforesaid were so clearly done by them as acts of State, in respect of which no action was maintainable, that the action should be summarily dismissed as frivolous and vexatious.

Secretary of State in Council of India v. *Kamachee Boye Sahaba* (1859) 7 Moo. Ind. App. 476; 13 Moo. P. C. 22, followed. SALAMAN *v.* SECRETARY OF STATE IN COUNCIL OF INDIA
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On the hearing of a complaint charging the appellant with selling milk in an altered condition contrary to s. 9 of the Sale of Food and Drugs Act, 1875, it having been proved by the analysis of the public analyst (who was not required by the appellant to be called as a

ADULTERATION—*continued.*

witness) that the milk was deficient in butter fat, the appellant required that the sample of the milk, which had been retained by the purchaser in accordance with s. 14 of the Act, should be produced and sent to the Commissioners of Inland Revenue for analysis under s. 21 of the Sale of Food and Drugs Act, 1899. The sample, which had been placed in a bottle, was produced, but the cork of the bottle having become loose, the sample was in consequence in such a condition as to make a satisfactory analysis impossible. The appellant was convicted :—

Held, that it was not a condition precedent to a conviction that the retained sample should not have been analysed; but that in order to support the conviction there must be a finding of fact by the magistrate that the sample had been sealed or fastened up in such manner as its nature would permit, as provided by s. 14 of the Act of 1875, and the case was therefore remitted to the magistrate.

Hutchison v. *Stevenson*, (1902) 4 F., J.C. 69, distinguished. SUCKLING *v.* PARKER **Div. Ct. 527**

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BANKRUPTCY—*Act of Bankruptcy—Assignment—Clause empowering Trustee or Committee of Inspection to give Preference to any Non-assenting Creditor—Validity of Deed—Petitioning Creditor—Claim for Preference under Deed—Trading with Trustee—Trustee's Title—Acquiescence—Estoppel—Bankruptcy Act*, 1883 (46 *&* 47 *Vict. c.* 52), *s.* 4, *sub-s.* 1 (*h*).

An act of bankruptcy committed by a debtor, under s. 4, sub-s. 1 (*h*), by the execution of an assignment for the benefit of his creditors, cannot be made the basis of a bankruptcy petition by a non-assenting creditor, if that creditor has done any act or acts amounting to an acquiescence in the deed or to a recognition of the trustee's title therein; as, for example, by supplying goods to and receiving payment therefor from the "trustee" as such, or by endeavouring to take advantage of a clause in the deed empowering the trustee of the deed in his own discretion or

BANKRUPTCY—*continued.*
at the direction of the committee of inspection "to pay in full, or otherwise than by dividends under these presents, any creditor or creditors who shall decline to execute or assent to these presents."

Ex parte Alsop, (1859) 1 De G. F. & J. 289, and *Ex parte Stray*, (1867) L. R. 2 Ch. 374, followed.

Per Cozens-Hardy L.J.: A clause such as that above mentioned, in a creditor's deed, is improper as providing a means of bribing a creditor to assent to the deed, and may go far towards invalidating the deed altogether. *In re* BRINDLEY. *Ex parte* TAYLOR, SONS & CO.
C. A. 377

2. —— *Receiving Order—Petitioning Creditor—Locus Standi—Assignment for Benefit of Creditors—Petitioning Creditor disentitled to use Assignment as act of bankruptcy—Petition founded on independent act of bankruptcy.*

A creditor, who has so acted with reference to an assignment for the benefit of creditors executed by his debtor, that he cannot be allowed to found a bankruptcy petition against the debtor on the deed as an act of bankruptcy, is yet, if he is not bound by the deed, entitled to present a bankruptcy petition against the debtor founded on an independent act of bankruptcy, though the result may be that the deed will be avoided as against the trustee in the debtor's bankruptcy.

Dictum of Lord Cairns L.J. in *Ex parte Stray*, (1867) L. R. 2 Ch. at p. 381, adopted.

Dictum of Vaughan Williams J. in *In re Woodroffe*, (1897) 4 Mans. at p. 49, approved. *In re* MILLS. *Ex parte* MILLS - **C.A. 389**

BEER—Licensing Acts.
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BIAS—Licensing Acts—Right of Justices to sit on Compensation Committee - **362**
See LICENSING ACTS. 2.

BILL OF SALE — *Registration — Apparent Possession — Bona fide Purchase — Execution Creditor—Bills of Sale Act*, 1878 (41 & 42 *Vict. c.* 31), *s.* 8.

In 1903 G., the owner of certain furniture in a house occupied by him, sold the furniture to a limited company by an agreement which was not registered as a bill of sale. In 1904 the company bona fide sold the furniture to G.'s mother by a document which was not registered. In 1905 the furniture, which had during the whole time remained in the apparent possession of G., was seized in execution under a judgment obtained against him. His mother having claimed the furniture:—

Held, that, as the claimant could neither shew a registered title nor that she had taken possession so as to render registration unnecessary, her title could not prevail against that of the execution creditor. HOPKINS *v.* GUDGEON
Div. Ct. 690

—— Untrue statement as to condition of goods—Liability of shipowner.
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See under COVENANT.

BURIAL—*Burial Ground—Erection of Monuments—Fees—Burial Act*, 1900 (63 & 64 *Vict. c.* 15), *s.* 3, *sub-s.* 4 (*i*).

In 1893 a burial board acquired eight acres of land adjoining, but separated by a wall from, seventeen acres then being used as a burial ground, with the intention of using the eight acres also for burial purposes. In 1897 communication was made between the two areas and the eight acres were laid out as a burial ground, but no burials in fact took place there until after the passing of the Burial Act, 1900. The incumbent of a parish who was entitled to receive fees in respect of the erection of monuments on the seventeen acres claimed under s. 3, sub-s. 4 (*i*) of the Burial Act, 1900, similar fees in respect of the eight acres:—

Held, that, although the eight acres formed part of the previously existing burial ground, the incumbent was not entitled to the fees claimed, because the eight acres had not been used as a burial ground before the passing of the Act. YOUNG *v.* JOINT BURIALS COMMITTEE FOR THE PARISHES OF KINGSTON-ON-THAMES, SURBITON, NEW MALDEN, AND COOMBE
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[1906] 1 K. B. 167

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—— *Attorney-General* v. *West*, [1897] 2 Q. B. 102.
Considered and applied by Walton J. ATTORNEY-GENERAL *v.* GLOSSOP [1906] 1 K. B. 284

—— *Barrett* v. *Markham*, (1872) L. R. 7 C. P. 405.
Applied by Div. Ct. MADDEN *v.* RHODES - - [1906] 1 K. B. 534

—— *Bradlaugh* v. *Reg.*, (1878) 3 Q. B. D. 607.
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—— *Municipal Permanent Investment Building Society* v. *Smith*, (1888) 22 Q. B. D. 70
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—— *Munster* v. *Lamb* - (1883) 11 Q. B. D. 588
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—— *Newbigin's Estate, In re*, (1887) 36 Ch. D. 477.
Distinguished by Farwell J. WANDSWORTH UNION *v.* WORTHINGTON [1906] 1 K. B. 420

—— *Rex* v. *Lloyd* - [1906] 1 K. B. 22
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—— *Risdon Iron and Locomotive Works* v. *Furness*, [1905] 1 K. B. 304.
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—— *Robson* v. *Smith* - [1895] 2 Ch. 118
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—— *Secretary of State in Council of India* v. *Kamachee Boye Sahaba*, (1859) 7 Moo. Ind. App. 476; 13 Moo. P. C. C. 22
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—— *Stray, Ex parte* - (1867) L. R. 2 Ch. 374
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—— *Watson, In re* - - - [1899] 1 Ch. 72
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—— *Woodroff, In re* - (1897) 4 Mans. 46
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—— *Ystradyfodwg and Pontypridd Main Sewerage Board* v. *Newport Assessment Committee*, [1901] 1 Q. B. 406.
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COAL—Charterparty — Implied condition that shipowner will not use ship in manner prejudicial to the charterer—Carriage of bunker coal intended for use on future voyage - - - - 572
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COLLECTING SOCIETIES AND INDUSTRIAL ASSURANCE COMPANIES — County court jurisdiction - - - 466
See JUSTICES. 1.

COMPANY—*Debenture-holder — Floating Security — Receiver — Judgment — Creditor — Attachment of Debts—Garnishee Order Nisi—Priority — Rights of Garnishor — Rules of Supreme Court, Order* XLV., *r.* 2.

In 1903 a limited company issued a series of debentures creating the usual first charge "by way of floating security" on all "real and personal property now or any time hereafter belonging to the company." On January 17, 1905, Y. & Co. obtained judgment against the

COMPANY—*continued.*

company, and on the same day they obtained and served on T. & Sons a garnishee order nisi for a debt of 434*l.* owing by that firm to the company. On January 19 a receiver and manager of the company was appointed in a debenture-holder's action. Notice of this appointment was served on Y. & Co. on January 20. The debt of 434*l.* having been claimed by both the judgment creditor and the receiver, the money was paid into Court. On an interpleader issue to determine the question of priority :—

Held, on the authority of *In re Combined Weighing and Advertising Company*, (1889) 43 Ch. D. 99, that as service of a garnishee order nisi did not operate as an assignment in equity or amount to a transfer of the debt, the right of the garnishor was subject to such rights and equities as already existed over this particular debt as the property of the company ; that at the time the garnishee order was served there was an existing charge on this property by virtue of the floating security created by the debentures, which was capable of becoming a specific charge when the debenture-holders intervened, and, consequently, that the receiver was entitled to the money now in Court in priority to the judgment creditor.

The dictum of James L.J. in *Ex parte Joselyne*, (1878) 8 Ch. D. 327, at p. 330, that "the moment the order of attachment was served on the garnishee the property in the debt due from him was absolutely transferred from the judgment debtor to the judgment creditor," must not be taken too literally, but must be read in conjunction with the facts and with what was said by the other Lords Justices in that case. *Robson* v. *Smith*, [1895] 2 Ch. 118, distinguished. NORTON *v.* YATES - - **Warrington J. 112**

2. ——*Limited Liability—Company formed for purpose of Trading in Foreign Country—Personal Liability of Shareholders under the Foreign Law—Conflict of Laws.*

An English company incorporated under the Joint Stock Companies Acts as a limited company, was formed for the purpose of acquiring and working mines in (amongst other countries) the United States of America, and by the articles of association the directors were empowered to do all things necessary to comply with the requirements of the law of any country where the company might carry on business. The company acquired and worked mines in the State of California, and for the purposes of those mines purchased from the plaintiffs, manufacturers in California, certain machinery. By the law of California, every shareholder of a company, whether incorporated in California or elsewhere, trading within that State is personally liable for such proportion of the company's debts as the amount of his shares bears to the whole of the subscribed capital of the company. The company having become insolvent, the plaintiffs sued the defendant, a shareholder of the company, in this country for his proportion of the price of the machinery :—

Held, that the defendant did not by becoming a member of the company upon the terms of the memorandum and articles of association authorize the directors to pledge his personal credit for the price of the goods supplied, and that, in the absence of express authority on his part, the action could not be maintained against him.

Judgment of Kennedy J., [1905] 1 K. B. 304, affirmed. RISDON IRON AND LOCOMOTIVE WORKS *v.* FURNESS - - - - **C. A. 49**

COMPANY—*continued.*

3. —— *Practice — Voluntary Winding-up — Stay of Proceedings in Action—Denial of Liability by Liquidator—Companies Act*, 1862 (25 *&* 26 *Vict. c.* 89), *ss.* 85, 87, 138—*Companies Act*, 1900 (63 *&* 64 *Vict. c.* 48), *s.* 25.

A company having gone into voluntary liquidation, an action was brought against it for money alleged to be payable to the plaintiff in respect of services rendered by him to the company. The liquidator denied any liability on the part of the company. On the liquidator's applying for a stay of proceedings in the action on the ground that the company was in liquidation :—

Held, that the question of the company's liability being a matter which was prima facie properly determinable in the ordinary way by an action, and no special ground for a stay of proceedings being made out, the application should, in the exercise of the discretion of the Court, be refused. CURRIE *v.* CONSOLIDATED KENT COLLIERIES CORPORATION, LIMITED **C. A. 134**

—— Debenture — Promissory note — Stamp—Treasury note of foreign Government—Marketable security - - - **318**
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COMPENSATION—Licensing Acts.
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—— Railway company—Coal required to be left unworked - - - - - **195**
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—— Transfer of powers of London School Board to London County Council — Direct pecuniary loss—Officer of authority whose powers not transferred - **346**
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—— Waterworks—Loss of support—Authorized working—Interest - - - **605**
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CONDITION—Precedent—Conviction—Analysis—Deterioration of sample - - **527**
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CONFLICT OF LAWS—Company formed for purpose of trading in foreign country—Personal liability of shareholders under the foreign law - - - - **49**
See COMPANY. 2.

CONSENT—Driftway, private—Conversion into public way—Persons whose consent necessary to - - - - **326**
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CONSENT—*continued.*

—— Weights and measures — Prosecution by inspector - - - - - **94**
See WEIGHTS AND MEASURES.

CONTEMPT OF COURT—*Publication tending to prejudice Fair Trial—Contempt of Inferior Court—Jurisdiction of King's Bench Division to attach for.*

The King's Bench Division has power to punish by attachment contempts of inferior Courts.

Where, a person having been charged at the petty sessions with an indictable offence triable either at the assizes or at quarter sessions, matter is published in a newspaper tending to interfere with the fair trial of the charge, the King's Bench Division has jurisdiction to attach the publisher of such matter for contempt of Court, notwithstanding that at the time of the publication it is uncertain whether the person charged, if committed at all, will be committed to the assizes or to the quarter sessions. THE KING *v.* DAVIES - - - - - - **Div. Ct. 32**

CONTRACT — *Damages — Forfeiture of Sum Deposited—Liquidated Damages or Penalty.*

In deciding whether a sum made payable by way of compensation for breach of a contract is to be treated as liquidated damages or as a penalty, the Court must take all the circumstances into consideration, in order to ascertain the intention of the parties. The fact that the sum in question is to be paid on the breach of any one of a variety of stipulations of different degrees of importance does not necessarily oblige the Court to treat it as a penalty, although it raises a presumption that that was the intention of the parties ; nor does the fact that the sum in question had been deposited at the making of the contract compel the Court to treat it as liquidated damages, although it forms a material element to be taken into consideration in ascertaining the intention of the parties. PYE *v.* BRITISH AUTOMOBILE COMMERCIAL SYNDICATE, LIMITED - - - **Bigham J. 425**

CONVERSION—Landlord and tenant—Distress—Uncertificated bailiff—Seizure of goods of third party - - - - **1**
See DISTRESS. 2.

"CONVEYANCE ON SALE"—Stamp duty **591**
See REVENUE. 9.

CONVEYANCING AND LAW OF PROPERTY—Lease by mortgagor in possession—Surrender of lease to mortgagee—Rights of mortgagee - - - **125**
See LANDLORD AND TENANT. 2.

CONVICTION—Condition precedent to—Analysis—Deterioration of sample - - **527**
See ADULTERATION. 1.

—— Cruelty to animals — One act—Several criminals - - - - - **719**
See CRIMINAL LAW. 1.

—— Duplicity—Highway - - - **262**
See CRIMINAL LAW. 2.

COSTS—*Writ of Possession—Order for Costs—Jurisdiction to make Order—Practice—Judicature Act*, 1890 (53 *&* 54 *Vict. c.* 44), *s.* 5.

The issue of a writ of possession, in pursuance of a judgment for possession of premises, is a proceeding in the Supreme Court, and the costs of and incident thereto are in the discretion of the Court or judge under s. 5 of the Judicature Act, 1890. DARTFORD BREWERY COMPANY, LIMITED *v.* MOSELEY - **C. A. 462**

COUNTY COURT—*Deputy Judge—Appointment of Two Deputies to act respectively for different Courts — Validity of Appointment — County Courts Act*, 1888 (51 *&* 52 *Vict. c.* 43), *s.* 18.

A county court judge may, under s. 18 of the County Courts Act, 1888, lawfully appoint a deputy to act for him in one of the district courts of which he is judge.

So *held* by Vaughan Williams L.J., Stirling L.J., and Fletcher Moulton L.J., the last-mentioned Lord Justice doubting.

Judgment of Div. Ct., [1906] 1 K. B. 22, affirmed. THE KING *v.* LLOYD - **C. A. 552**

2. ——*Practice—Right of Plaintiff to Reply.*

Where the defendant in an action in a county court calls evidence, the plaintiff has a right to reply. CLACK *v.* CLACK **Div. Ct. 483**

—— Distress — Implement of trade — Cab — Landlord and tenant - - - **480**
See DISTRESS. 1.

—— Jurisdiction — Industrial insurance company—Disputes - - - - **466**
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COVENANT—Lease—Covenant for quiet enjoyment—Breach of covenant—Interruption by assignee - - - - **155**
See LANDLORD AND TENANT. 1.

CREDITOR—Bankruptcy.
See under BANKRUPTCY.

—— Execution creditor—Bill of sale—Apparent possession—Bona fide purchase - **690**
See BILL OF SALE.

CRIMINAL LAW — *Conviction — Cruelty to Animals—One act—Several Animals—Cruelty to Animals Act*, 1849 (12 *&* 13 *Vict. c.* 92), *s.* 2.

A conviction for an offence under s. 2 of the Cruelty to Animals Act, 1849, stated that the defendant was convicted for that he did cruelly ill-treat, abuse and torture five cows by causing them to be over-stocked with milk. On an objection being taken that the conviction was bad on its face in that it was a conviction for five separate and distinct offences :—

Held, that an act or omission affecting several animals may constitute one offence under s. 2, and that the conviction was not bad on its face. THE KING *v.* CABLE **Div. Ct. 719**

2. —— *Conviction — Duplicity — Highway Act*, 1835 (5 *&* 6 *Will.* 4, *c.* 50), *s.* 72.

Sect. 72 of the Highway Act, 1835, makes it an offence to lay any substance upon the highway "to the injury, interruption or personal danger of any person travelling thereon" :—

Held, that a conviction for having laid matter on the highway "to the interruption and personal danger of any person travelling thereon" was not bad for duplicity under the Summary Jurisdiction Act, 1848, for that the act of laying the matter on the highway, followed by any one or more of the consequences above mentioned, constituted but one offence. SMITH *v.* PERRY - **Div. Ct. 262**

CRIMINAL LAW—*continued.*

3. —— *Falsification of Accounts—Document not belonging to or in Possession of Employer—Falsification of Accounts Act*, 1875 (38 & 39 *Vict. c.* 24), *s.* 1.

The prisoner, a servant, was convicted under s. 1 of the Falsification of Accounts Act, 1875, on an indictment which charged him with making a false entry in an account. It was proved that the account in question did not belong to and was not in the possession of his employer:—

Held, that the conviction must be quashed, since the intention of the Legislature, as manifested in the preamble to the Act, was to punish the falsification by clerks, officers, servants, or others of their employers' accounts. THE KING *v.* PALIN - - - - - - - **C. C. R. 7**

4. —— *Indictment—Form—Receipt of Money stolen by Wife from Husband—Indictment for Misdemeanour—Absence of Allegation that Thief was Wife of Person from whom Money stolen—Larceny Act*, 1861 (24 & 25 *Vict. c.* 96), *s.* 91—*Married Women's Property Act*, 1882 (45 & 46 *Vict. c.* 75), *ss.* 12, 16.

An indictment charging as a misdemeanour the receipt by a person of money in fact stolen by a wife from her husband knowing the money to have been stolen is good, inasmuch as the stealing by a wife of her husband's property does not amount to a felony either at common law or by virtue of the Larceny Act, 1861, but is made a criminal offence by the Married Women's Property Act, 1882, and therefore the receiving of such stolen property is not a felony within the meaning of s. 91 of the Act of 1861; and as there is no other statute making such receipt a felony, it is a misdemeanour only. It is not necessary (although it may be better) to insert in the indictment an allegation that the money belonged to the husband and had been stolen from him by his wife. THE KING *v.* PAYNE. **C. C. R. 97**

5. —— *Indictment — Obscene Libel — Indictment for Defamatory Libel containing obscene Matter—Deposit of Document containing alleged Libel—Exhibit to Depositions—Law of Libel Amendment Act*, 1888 (51 & 52 *Vict. c.* 64), *s.* 7.

An indictment for publishing a libel, which was bad as a charge of publishing a defamatory libel for not setting out the passages relied upon (see *Bradlaugh* v. *Reg.*, (1878) 3 Q. B. D. 607), contained an averment that the defendant "unlawfully . . . . did . . . . publish . . . . a . . . . libel . . . . in the form of a document . . . . which said document . . . . contains divers . . . . obscene . . . . matters and things."

The judge at the trial held that this amounted to an indictment for an obscene libel, and the prisoner was convicted:—

Held, that although it would have been better for the indictment to have followed the old forms, and to have averred that the tendency of the obscene matter was to corrupt the public morals, and that the libel had been published with that intent, the conviction might under the circumstances be upheld.

It is not necessary, in order to satisfy the

CRIMINAL LAW—*continued.*

provisions of s. 7 of the Law of Libel Amendment Act, 1888—which provides that the obscene matter need not be set out in the indictment but that it shall be sufficient to deposit the document "containing the alleged libel with the indictment or other judicial proceeding"—that the incriminated document should be handed in with the bill of indictment, if it is already in the custody of the clerk of assize as an exhibit attached to the depositions. THE KING *v.* BARRACLOUGH - - - - - **C. C. R. 201**

CROSS-EXAMINATION.
See under EVIDENCE.

CRUELTY TO ANIMALS — Conviction — One act—Several animals - - - **719**
See CRIMINAL LAW. 1.

CUSTOMS AND INLAND REVENUE.
See under REVENUE.

DAMAGE AND DAMAGES—Bill of lading—Untrue statement as to condition of goods—Liability of shipowner—Measure of damages - - - - - **237**
See SHIPPING. 1.

—— Contract—Forfeiture of sum deposited—Liquidated damages or penalty - **425**
See CONTRACT.

—— Ship—Defective berth—Duty of harbour authority—Duty of wharf owner **48**
See HARBOUR.

DEATH—Libel—Death of defendant—Abatement of action—Application by defendant's executors for payment out of money - - - - - - **563**
See PRACTICE. 1.

DEBENTURE—Stamp—Treasury note of foreign Government — Promissory note — Marketable security - - - **318**
See REVENUE. 8.

DEBENTURE-HOLDER—Receiver—Attachment of debts — Garnishee order nisi — Priority - - - - - **112**
See COMPANY. 1.

DEBTS — Attachment — Company — Debenture-holder—Receiver—Garnishee order nisi —Priority - - - - - **112**
See COMPANY. 1.

DEFAMATION—*Slander—Magistrate—"Judge" Criminal Charge—Withdrawal of Prosecution—Defamatory Words against Prosecutor—Malice—Privilege—Reasonable Cause of Action—Striking out Pleading—Rules of Supreme Court*, 1883, *Order* XXV., *r.* 4.

A magistrate, when sitting in the course of his judicial duties, is a "judge" within the meaning of the rule laid down by *Munster* v. *Lamb*, (1883) 11 Q. B. D. 588, and *Hodson* v. *Pare*, [1899] 1 Q. B. 455—that defamatory observations by a judge in the course of his judicial duties are not actionable. Thus a defamatory statement made by a magistrate, while sitting in the course of his judicial duties, respecting a prosecutor upon or with reference to the withdrawal of a criminal charge before the

DEFAMATION—*continued.*

Court, was held not to be actionable, even though it was alleged that the statement was made falsely and maliciously and without reasonable cause. Accordingly, the statement of claim in an action for slander brought by the prosecutor against the magistrate on the ground of that defamatory statement was ordered to be struck out under the Rules of the Supreme Court, Order xxv., r. 4, as disclosing no reasonable cause of action.

Decision of Channell J. affirmed.

Allardice v. *Robertson,* (1830) 1 Dow & Cl. 495, is not law in England. LAW *v.* LLEWELLYN **C. A. 487**

—— Discovery—Interrogatories—Libel—Names of informants - - - - **403**
See DISCOVERY.

—— Indictment for defamatory libel containing obscene matter - - - - **201**
See CRIMINAL LAW. 5.

—— Libel—Death of defendant—Abatement of action — Application by defendant's executors for payment out of money. **563**
See PRACTICE. 1.

DEPOSITIONS—Exhibit to—Deposit of document containing alleged libel - **201**
See CRIMINAL LAW. 5.

DEPUTY JUDGE—Appointment of two deputies to act respectively for different Courts—Validity - - - - **552**
See COUNTY COURT. 1.

DISCOVERY — *Interrogatories — Defamation—Libel in Periodical Publication—Defence of Fair Comment—Information on which Defamatory Statement founded — Names of Informants — Practice.*

In an action of libel against the publishers of a trade periodical, in respect of an article contained in an issue of their periodical, the defendants pleaded by way of defence that, in so far as the words complained of consisted of expressions of opinion, they were fair comment, made in good faith, and without malice, on a matter of public interest, and, in so far as they consisted of allegations of fact, they were true in substance and in fact. The plaintiffs administered to the defendants, among others, interrogatories which were substantially as follows: (5.) What information had you, when you published the said words, which induced you to believe that the expressions of opinion in the said words contained, and which you allege to be fair comment, made in good faith, and without malice, were true? Did you in fact believe that the said opinions were true? (7.) From whom did you obtain the information on which you relied in publishing the said expressions of opinion? The defendants objected to answer these interrogatories:—

Held, that the fifth interrogatory was inadmissible, and must therefore be answered, but that, according to the general rule of practice in actions of libel against the publishers of newspapers in respect of matter published in their newspapers, the seventh interrogatory was, in the absence of special circumstances, inadmissible, and the defendants ought not to be compelled to answer it. PLYMOUTH MUTUAL CO-OPERATIVE AND INDUSTRIAL SOCIETY, LIMITED *v.* TRADERS' PUBLISHING ASSOCIATION, LIMITED - - - - **C. A. 403**

DISTRESS—*Implement of Trade—Cab over the value of 5l.—Privilege—Landlord and Tenant—Law of Distress Amendment Act*, 1888 (51 *&* 52 *Vict. c.* 21), *s.* 4—*County Courts Act*, 1888 (51 *&* 52 *Vict. c.* 43), *s.* 147.

A distress having been levied on a stable, which was in the occupation of a cab-driver, for rent in arrear, the only article on the premises proved to be a cab of the value of more than 5*l.*, which was accordingly seized:—

Held, that the cab was privileged from seizure under s. 147 of the County Courts Act, 1888, as an implement of the man's trade, and that the fact that it was above the value of 5*l.* did not exclude the operation of the exemption. LAVELL *v.* RICHINGS - - - **Div. Ct. 480**

2. —— *Landlord and Tenant — Distress — Uncertificated Bailiff—Seizure of Goods of Third Party—Conversion—Law of Distress Amendment Act*, 1888 (51 *&* 52 *Vict. c.* 21), *s.* 7.

If a person, not holding a certificate issued under s. 7 of the Law of Distress Amendment Act, 1888, levy a distress for rent, and, in so doing, seizes goods upon the demised premises which are not the property of the tenant but of a third party, the owner of the goods is entitled to recover damages in respect of the seizure of his goods from the landlord who has authorized the distress. PERRING & CO. *v.* EMERSON. **Div. Ct. 1**

—— Poor rate—Outgoing occupier—Apportionment of rate — Demand — Distress warrant - - - - - **221**
See RATES. 1.

DIVERSION—Highway—Certificate of justices—Appeal to quarter sessions - **724**
See HIGHWAY. 1.

DRIFTWAY — Private driftway — Conversion into public way—Persons whose consent necessary to - - - - **326**
See HIGHWAY. 3.

DRUGS—Sale of food and.
See under ADULTERATION.

DUTY—Public revenue.
See under REVENUE.

EDUCATION — Compensation — Transfer of powers of London School Board to London County Council—Officer - **346**
See LOCAL GOVERNMENT. 2.

EDUCATION ACTS — *Non-provided School — Teacher engaged by Managers — Salary paid directly by Local Education Authority—Right of Teacher to sue Local Education Authority—Education Act*, 1902 (2 *Edw.* 7, *c.* 42), *s.* 7.

Sect. 7 of the Education Act, 1902, does not create privity of contract between a teacher in a non-provided school and the local education authority, notwithstanding the fact that the salary of the teacher is paid directly by the

EDUCATION ACTS—*continued.*
authority. The teacher, therefore, cannot maintain an action for salary against the local education authority. CROCKER *v.* PLYMOUTH CORPORATION - - - - **Div. Ct. 494**

EMPLOYER AND WORKMAN—Guardians — Negligence of servant — Liability of guardians to pauper inmate in action of tort—Common employment - **538**
See POOR LAW. 1.

—— Sale by servant—Beer—Offences—Scope of employment - - - - - **432**
See LICENSING ACTS. 6.

EQUITABLE EXECUTION — Appointment of receiver — Impediments to ordinary execution—Defendants out of the jurisdiction - - - - - - **373**
See RECEIVER.

ESTATE DUTY—Property passing on death—Settlement - - - - - - **284**
See REVENUE. 2.

ESTOPPEL—Bankruptcy—Assignment — Claim for preference under deed — Trading with trustee—Trustee's title — Acquiescence - - - - - - **377**
See BANKRUPTCY. 1.

—— Bill of lading—Master's authority—Liability of shipowner—American "Harter Act"—Measure of damages - **237**
See SHIPPING. 1.

EVIDENCE—Licence—Renewal—Cross-examination as to licensed houses not included in Report - - - - - - **437**
See LICENSING ACTS. 5.

EXCISE—Beer—Soliciting or taking order at place other than that specified in licence - - - - - - **266**
See REVENUE. 3.

EXECUTION — Equitable — Appointment of receiver — Impediments to ordinary execution—Defendants out of the jurisdiction - - - - - - **373**
See RECEIVER.

EXECUTION CREDITOR—Bill of sale—Registration — Apparent possession — Bona fide purchase - - - - - **690**
See BILL OF SALE.

EXHIBIT — Deposit of document containing alleged libel—Exhibit to depositions
See CRIMINAL LAW. 5. **201**

FALSE TRADE DESCRIPTION - - - **16**
See MERCHANDISE MARKS.

FALSIFICATION OF ACCOUNTS — Document not belonging to or in possession of employer - - - - - - **7**
See CRIMINAL LAW. 3.

FEES—Burial ground—Erection of monuments - - - - - - **338**
See BURIAL.

FERTILIZERS AND FEEDING STUFFS—False description—Guilty knowledge - **131**
See ADULTERATION. 2.

FINANCE ACTS.
See under REVENUE.

FISHERY ACTS—*Fishery District—River—Tributary — What is — Mill Dam — Stream — Licence—Salmon Fishery Act*, 1865 (28 & 29 *Vict. c.* 121), *s.* 35—*Freshwater Fisheries Act*, 1878 (41 & 42 *Vict. c.* 39), *ss.* 6, 7.

From a stream, which was a tributary of a salmon river, a mill race was conducted to certain mills. For the purpose of increasing the water-power to the mills a triangular mill pond was constructed opening out of the mill race, and the water flowed backwards and forwards from the pond to the mill race, the water in the pond and race being always at the same level. All the water ultimately, after turning the mills, returned to the stream :—

Held, that the mill pond was a tributary of the stream, and that persons fishing in it required a licence from the fishery board of the district. MOSES *v.* IGGO - - - - **Div. Ct. 516**

2. —— *Oyster Ponds on Foreshore—Ancient User—Presumption of Legal Origin—Right of Occupier as against Wrong-doer—Public Health — Urban Sanitary Authority — Sewer — Discharge of Sewage into the Sea—Nuisance from Sewage—Acts of Commission—Public Health Act*, 1875 (38 & 39 *Vict. c.* 55), *ss.* 19, 27.

Oyster ponds or "layings" had existed as far back as living memory went upon the foreshore of an arm of the sea. The purpose for which these ponds were used was the storage of oysters, which were brought from elsewhere and laid down in the ponds in order to be fattened for the market. Certain ponds of this kind, which were enclosed by boards or concrete, were, and for more than twenty years had been, used in the manner above mentioned by the plaintiff, who had purchased them in 1879 from others who had for a period of between twenty and thirty years previously so used them. There was some evidence that the foreshore had formed part of the waste of a manor, the lord of which had a several fishery thereon.

The defendants were an urban district council which had been constituted in 1894, their district being carved out of that of a previously existing rural sanitary authority. A sewer had been made in the district by the rural sanitary authority, from which an inconsiderable quantity of sewage had been discharged into the sea near the oyster ponds. The defendants made certain new sewers, and connected them with the first-mentioned sewer, and the quantity of sewage discharged from that sewer was thereby greatly increased. The sewage so discharged caused a nuisance to the plaintiff's oyster ponds through pollution of the same with sewage to an extent which rendered them unfit for use. In an action by the plaintiff against the defendants in respect of the nuisance so caused :—

Held that, irrespectively of the question of title to the soil or to a several fishery, the plaintiff, as occupier of the oyster ponds, was entitled to maintain an action for trespass to the same by wrong-doers ; that the defendants, not having any right to discharge sewage into the sea so as to cause a nuisance, and having by their

FISHERY ACTS—*continued.*
acts of commission caused such a discharge of sewage, were wrong-doers; and therefore that the action was maintainable.

By Vaughan Williams L.J.: *Semble*, the plaintiff, if necessary, could make a title as owner of the oyster ponds.

By Fletcher Moulton L.J.: Under the circumstances a legal origin ought to be presumed for the existence and user by the plaintiff of the oyster ponds.

Query as to the defendants' liability for a nuisance to the plaintiff's oyster ponds, if occasioned by their mere nonfeasance. FOSTER *v.* URBAN DISTRICT COUNCIL OF WARBLINGTON - - - - - - - - **C. A. 648**

FOOD AND DRUGS—Sale of.
See under ADULTERATION.

FOREIGN LAW—Personal liability of shareholders under the—Conflict of laws **49**
See COMPANY. 2.

FORESHORE—Oyster ponds on—Ancient user—Public Health—Nuisance from sewage - - - - - - - - **648**
See FISHERY. 2.

FORFEITURE—Contract—Forfeiture of sum deposited—Liquidated damages or penalty - - - - - - **425**
See CONTRACT.

FRANCE—"Conveyance on sale"—Stamp duty—Property in France—Conveyance executed in France—Consideration payable in England - - **591**
See REVENUE. 9.

FRANCHISE.
See under PARLIAMENT.

FRESHWATER FISHERIES.
See under FISHERY ACTS.

GARNISHEE—Company—Debenture-holder—Receiver—Attachment of debts—Garnishee order nisi—Priority - - **112**
See COMPANY. 1.

GUARDIANS—Poor law.
See under POOR LAW.

HARBOUR—*Ship—Damage—Defective Berth—Duty of Harbour Authority—Duty of Wharf Owner.*

In an action by the owners of a steamship against trustees, in whom a harbour was vested by statute with the usual rights as to tolls, and duties as to maintenance, and against a railway company, owners of a wharf, to recover the amount of damage sustained by their vessel by reason of the defective condition of a berth alongside the wharf in the harbour, the defence on the part of the trustees substantially was that as they had not received any report from the local pilots, upon whom the duty was imposed by their by-laws of making periodical inspections and taking soundings, they had not been negligent in being unaware of the defective condition of the berth. Secondly, that the defect was due to the wrongful act of those in charge of a steamer throwing the stokehold refuse overboard immediately prior to the arrival of the plaintiffs' vessel, and, therefore, it was not reasonably possible for the trustees to be aware of the defect, as periodical inspections would not have detected it. The defence on the part of the railway company was that as the responsibility of keeping the berth in proper condition rested with the trustees, who they knew employed the pilots to take the necessary soundings, they were not negligent in being unaware of a defect due to a breach of the harbour by-laws by persons unknown:—

Held, by the Court of Appeal, affirming the decision of the Court below, that both defendants were liable—the trustees because they had negligently omitted to perform the duty laid down in *Mersey Docks Trustees* v. *Gibbs*, (1866) L. R. 1 H. L. 93, of taking reasonable care to see whether the harbour, including the berth in question, was in a fit condition, and they could not shift this duty on to the local pilots who were not their servants, and whose duty to sound was for the purpose of enabling them efficiently to navigate the vessels employing them. Secondly, assuming, without evidence, that the defect had been caused so shortly before the plaintiffs' vessel came in that periodical examinations would not have detected it, this defence was not open to them, because they had not performed their duty of examination of the berth by their servants, and, therefore, could not be heard to say that if they had done their duty the defect would not have been detected. The railway company was liable under the rule in *The Moorcock*, (1889) 14 P. D. 64, because as owners of the wharf they had invited the plaintiffs' vessel alongside for profit to themselves, and could not rely upon the pilots performing the duty cast upon them by the trustees, for, in their capacity as wharf owners, the railway company had the opportunity of ascertaining the condition of the berth, and should, therefore, have either satisfied themselves that it was reasonably fit, or warned those in charge of the vessel that they had not done so. THE BEARN **C. A. P. 48**

HIGHWAY—*Diversion—Certificate of Justices—Appeal to Quarter Sessions—Party Injured or aggrieved—Findings of Jury—Statute—Contradictory Terms—Construction—Substitution of "and" for "or"—Highway Act*, 1835 (5 & 6 *Will.* 4, *c.* 50), *s.* 89.

In construing a statute "or" may be read as "and" if the context makes that the necessary meaning.

Sect. 89 of the Highway Act, 1835, provides that if, on an appeal to quarter sessions under s. 88 by a person who thinks that he will be injured or aggrieved by a proposed diversion of a highway, the jury find that the proposed new highway is more commodious to the public, *or* that the party appealing would not be injured or aggrieved, the Court shall dismiss the appeal, but that if the jury find that the proposed new highway is not more commodious or that the party appealing would be injured or aggrieved, the Court shall allow the appeal. A jury at quarter sessions found (1.) that a proposed new highway would be more commodious to the

HIGHWAY—*continued.*

public, (2.) that the party appealing would be injured or aggrieved if the existing highway were stopped up and the proposed new one substituted :—

Held, that s. 89 was contradictory and could only be construed by reading the word "or" in the first part of the section as "and," and that on the findings of the jury the appeal to quarter sessions must be allowed. WALKER *v.* YORK CORPORATION - - - - - **Div. Ct. 724**

2. —— *Locomotive—Traction Engine—Excessive Weight—Injury to Water Main.*

The plaintiffs, who were the road authority within their district, were also the owners of the water mains beneath the roads. A duly licensed traction engine belonging to the defendant, weighing upwards of ten tons, and drawing three trucks, broke the water main under one of the streets for which the plaintiffs were the road authority. The main had been laid at least thirty years, but was found as a fact to be sufficiently strong and well laid to withstand the pressure of the ordinary traffic of the district. The plaintiffs had been guilty of no neglect or default in the execution of their duty as the road authority, and neither the defendant nor his servants had been guilty of any neglect or want of skill or care in the construction or use of the traction engine. A county court judge found that the injury was caused by the excessive weight of the defendant's traction engine, and that the defendant was liable for the cost of repairing the broken water main :—

Held, that in using an exceptionally heavy locomotive the defendant was exercising his right to use the highway in a way that was not necessary in order to enable him to enjoy it, and that the decision was right.

Attorney-General v. *Scott*, [1905] **2 K. B. 160**, considered. CHICHESTER CORPORATION *v.* FOSTER - - - - - - **Div. Ct. 167**

3. —— *Private Driftway — Conversion into Public Way—Persons whose Consent necessary to—"Occupiers"—Highway Act*, 1862 (25 & 26 *Vict. c.* 61), *s.* 36.

Persons entitled to a right of passage, by way of easement or licence, over a driftway or other private road are not "occupiers" of the way within the meaning of s. 36 of the Highway Act, 1862, and their consent is not necessary to an application to justices for a declaration converting the way into a public highway. THE KING *v.* SOMERS - - - - - **Div. Ct. 326**

—— Conviction—Duplicity. - - - **262**
See CRIMINAL LAW. 2.

HOSPITAL—*Public Health—Infectious Hospital—Discharge of Patient while still Infectious—Liability of Local Authority—Public Health Act*, 1875 (38 & 39 *Vict. c.* 55), *ss.* 124, 131, 132.

The defendants, a local authority, acting under the provisions of the Public Health Act, 1875, provided for the use of the inhabitants of their district a hospital for the reception of persons suffering from infectious diseases. A visiting physician, who was a competent medical practitioner, was appointed to the hospital, and acted under the general directions of the hospitals

HOSPITAL—*continued.*

committee of the defendants, the rules providing (inter alia) that he should be responsible for "the treatment of the patients from the beginning to the end of their stay, and also for their freedom from infection when discharged." A son of the plaintiff was treated in the hospital while suffering from a mild attack of scarlet fever, and was ultimately discharged by the visiting physician while still in an infectious condition, and under circumstances which a jury found to amount to a want of reasonable skill and care on his part in and about the discharge ; after the boy had returned home, he communicated the disease to three other children of the plaintiff. The plaintiff then sued the defendants to recover the expense to which he had been put in regard to the illness of his other children owing to the premature discharge of his son from the hospital by the visiting physician :—

Held, that the plaintiff was not entitled to recover, for the legal obligation of the defendants extended only to the provision of reasonably skilled and competent medical attendance for the patients, which they had discharged, and that there was no absolute undertaking or obligation on their part that no patient should be discharged by the visiting physician while still in a condition which might cause infection. EVANS *v.* LIVERPOOL CORPORATION
Walton J. 160

HOUSE DUTY—Inland Revenue - **272, 278**
See REVENUE. 4, 5.

HOUSE REFUSE — Removal of — Failure of sanitary authority to remove - **470**
See LONDON. 1.

HUSBAND AND WIFE—Indictment—Form—Receipt of money stolen by wife from husband—Larceny - - - **97**
See CRIMINAL LAW. 4.

INCOME TAX—Public Revenue - **294, 311**
See REVENUE. 6, 7.

INDIA—Act of State—Annexation of native State—Jurisdiction of municipal Courts.
See ACT OF STATE.

INDICTMENT — Form — Larceny — Receipt of money stolen by wife from husband **97**
See CRIMINAL LAW. 4.

—— Obscene matter, Indictment for defamatory libel containing - - - - **201**
See CRIMINAL LAW. 5.

INDUSTRIAL ASSURANCE COMPANY — Disputes—County court jurisdiction **466**
See JUSTICES.

INFECTIOUS HOSPITAL.
See under HOSPITAL.

INLAND REVENUE.
See under REVENUE.

INSURANCE, LIFE—County court jurisdiction —Industrial assurance company—Disputes - - - - - - **466**
See JUSTICES. 1.

INSURANCE, MARINE—*Reinsurance*—"*Excess*" *Policy*—*Craft Risk*—"*Each Craft to be deemed a separate Insurance*"—*Loss in Craft*—*Calculation of Excess.*

The plaintiff company, having insured a cargo of wheat to the extent of 1914*l.*, reinsured with the defendants by a policy for "1000*l.* excess of 500*l.*" Both the original and the reinsurance policies covered risk of craft, and contained a clause that each craft was "to be deemed a separate insurance." Owing to the sinking of a craft containing a portion of the cargo a loss occurred which the plaintiff company sought to recover from the defendants under the reinsurance policy. The interest of the plaintiff company in the cargo in the particular craft did not amount to 500*l.*, and the defendants repudiated liability on the ground that, as each craft was to be deemed a separate insurance, there had been no loss of any "excess of 500*l.*" :—

Held, that the clause had no application to the circumstances of the case; that the "excess" for which the defendants were liable ought to be calculated on the value of the plaintiff company's whole interest at risk, and not on the company's interest in the particular craft only; and that the defendants were therefore liable for their proportion of the loss. SOUTH BRITISH FIRE AND MARINE INSURANCE COMPANY OF NEW ZEALAND *v.* DA COSTA **Bigham J. 456**

INTEREST—Money-lender—Loan transaction—Excessive interest—Risk - - **79**
See MONEY-LENDER. 2.

—— Poor rate — Rateable value — Railway—Interest on cost of construction - **597**
See RATES. 3.

—— Waterworks—Loss of support—Authorized working—Compensation - - **605**
See WATERWORKS.

INTERNATIONAL LAW.
See under CONFLICT OF LAWS.

INTERROGATORIES—Practice.
See under DISCOVERY.

JUDGE—Deputy judge—Appointment of two deputies to act respectively for different Courts—Validity - - - **552**
See COUNTY COURT. 1.

JUDGMENT CREDITOR—Company — Debenture-holder—Receiver—Garnishee order nisi—Priority - - - - **112**
See COMPANY. 1.

JUDICATURE ACT—Costs—Writ of possession—Jurisdiction to make order - **462**
See COSTS.

—— Equitable execution — Appointment of receiver—Impediments to ordinary execution - - - - - **373**
See RECEIVER.

JURISDICTION—Act of State—Annexation of native State — Confiscation — Jurisdiction of municipal Courts - - **613**
See ACT OF STATE.

JURISDICTION—*continued.*

—— Contempt of inferior Court—Jurisdiction of King's Bench Division to attach for
See CONTEMPT OF COURT. **32**

—— Costs—Writ of possession—Order for costs—Jurisdiction to make order - **462**
See COSTS.

—— County court—Industrial assurance company—Disputes - - - - - **466**
See JUSTICES. 1.

—— Equitable execution — Appointment of receiver—Defendants out of the jurisdiction - - - - - - **373**
See RECEIVER.

—— Service out of the jurisdiction—Writ of summons—Agent for foreign principal—Implied covenant not to prevent agent acting - - - - **254**
See PRACTICE. 2.

—— Staying action — Cause of action arising out of jurisdiction - - - **141**
See PRACTICE. 3.

—— Summary jurisdiction—Offence of trifling nature - - - - - - **357**
See LICENSING ACTS. 7.

JUSTICES — Adulteration — Sale of food and drugs.
See under ADULTERATION.

—— Criminal law.
See under CRIMINAL LAW.

—— Cruelty to animals—Conviction—One act—Several animals - - - **719**
See CRIMINAL LAW. 1.

—— Fishery district—River—Tributary, What is—Mill dam - - - - - **516**
See FISHERY ACTS. 1.

—— Food and Drugs, Sale of.
See under ADULTERATION.

—— Highway—Conviction—Duplicity - **262**
See CRIMINAL LAW. 2.

—— Highway — Diversion — Certificate of justices—Appeal to quarter sessions — Statute — Contradictory terms — Construction - - - - - - **724**
See HIGHWAY. 1.

—— Highway — Private driftway—Conversion to public way—Persons whose consent necessary to - - - - - **326**
See HIGHWAY. 3.

—— House refuse, removal of — Failure of sanitary authority to remove - **470**
See LONDON. 1.

1. —— *Jurisdiction — Industrial Assurance Company — Disputes — Collecting Societies and Industrial Assurance Companies Act*, 1896 (59 *&* 60 *Vict. c.* 26), *ss.* 1, 7—*County Court Jurisdiction.*

By s. 1 (*b*) of the Collecting Societies and Industrial Assurance Companies Act, 1896, that Act applies to industrial assurance companies granting policies of life assurance for a less sum than 20*l.*, and receiving premiums by means of collectors at a greater distance than ten miles from the registered office or principal place of

JUSTICES—*continued.*
business of the company at less periodical intervals than two months. By s. 7 disputes between an industrial insurance company and a member or person insured or a person claiming through him may be settled by the county court or by a court of summary jurisdiction :—

Held, that the jurisdiction of a county court or court of summary jurisdiction was limited to disputes arising with regard to policies originally granted for a less sum than 20*l.*

Quære, whether an industrial assurance company issuing policies for 20*l.* and upwards, as well as policies for sums less than 20*l.*, comes within the provisions of s. 7, so as to give any jurisdiction over disputes to a county court or court of summary jurisdiction. COWLING *v.* TOPPING - - - - - - **Div. Ct. 466**

—— Licensing Acts.
See under LICENSING ACTS.

—— Magistrate—"Judge"—Slander—Criminal charge—Withdrawal of prosecution **487**
See DEFAMATION.

—— Offences—Unsound meat—Information by sanitary inspector — Necessity for authority - - - - **709**
See LONDON. 2.

—— Passage not a thoroughfare—Requirement of owner to pave a second time with different material - - - **703**
See LONDON. 3.

—— Pharmacy Acts—Sale of poisons - **330**
See PHARMACY ACTS.

—— Poor rates.
See under RATES.

—— Privies and cesspools, cleansing of—Power of local authority to undertake duty of - - - - - - - **233**
See LOCAL GOVERNMENT. 1.

—— Revenue — Excise — Beer — Soliciting or taking order at place other than that specified in licence - - - **266**
See REVENUE. 3.

—— Street — Making-up — Power to charge frontagers residing outside limits of local authority - - - - **521**
See STREET.

—— Trade Union—Officer—Absence of fraud—Liability to penalties - - - **534**
See TRADE UNION.

—— Water-closets, repairing apparatus of existing—Requirement of notice—Sanitary authority - - - - - **512**
See LONDON. 4.

LANDLORD AND TENANT—*Lease—Covenant for Quiet Enjoyment—Assignment of Reversion—Breach of Covenant—Interruption by Assignee.*

In 1886 a lease for twenty-one years was granted to the plaintiff of certain rooms on the ground and first floors of a block of buildings, the whole of which belonged to the lessor. The lease contained a covenant for quiet enjoyment of the rooms demised to the plaintiff "without any interruption or disturbance" by the lessor "or any person claiming under him." In 1891 the lessor assigned his reversion in the whole of the buildings. In 1904 the buildings, other than the part demised to the plaintiff, became so dilapidated that an order was made, under the London Building Acts, for their demolition. The assignees of the reversion in carrying out the work of demolition caused an interruption of the enjoyment of the plaintiff's premises. The lessor being dead, the plaintiff sued his representatives to recover damages for breach of his covenant for quiet enjoyment :—

Held, that the assignees of the reversion could not claim under the lessor a right to do the acts which caused the interruption, and that the representatives of the lessor were, therefore, not liable. WILLIAMS *v.* GABRIEL
Bray J. 155

2. —— *Lease by Mortgagor in Possession—Surrender of Lease to Mortgagor—Rights of Mortgagee—Conveyancing and Law of Property Act*, 1881 (44 *&* 45 *Vict. c.* 41), *s.* 18, *sub-ss.* 1, 11.

A mortgagor in possession, who has granted a lease under the statutory power conferred on him by s. 18, sub-s. 1, of the Conveyancing Act, 1881, has no power to accept a surrender of the lease without the concurrence of his mortgagee.

Observations of Fry L.J. in *Municipal Permanent Investment Building Society* v. *Smith*, (1888) 22 Q. B. D. at p. 72, applied. ROBBINS *v.* WHYTE - - - **Warrington J. 125**

—— Distress—Cab—Implement of trade - **480**
See DISTRESS. 1.

—— Distress—Uncertificated bailiff—Seizure of goods of third party—Conversion - **1**
See DISTRESS. 2.

LARCENY — Indictment — Form — Receipt of money stolen by wife from husband **97**
See CRIMINAL LAW. 4.

LEASE.
See under LANDLORD AND TENANT.

LIBEL.
See under DEFAMATION.

—— Indictment for defamatory libel containing obscene matter - - - - **201**
See CRIMINAL LAW. 5.

LICENCE.
See under LICENSING ACTS.

—— Fishery Acts.
See under FISHERY ACTS.

LICENSING ACTS — *County Borough—Compensation Authority—Refusal to renew Licence—Appeal to Quarter Sessions of County—Licensing Act*, 1904 (4 *Edw.* 7, *c.* 23), *s.* 8, *sub-s.* 2.

Where the whole body of justices of a county borough acting as the compensation authority under the Licensing Act, 1904, refuse to renew an on-licence subject to compensation, no appeal lies from their decision to the quarter sessions of the county under s. 27 of the Alehouse Act, 1828. THE KING *v.* SOUTHAMPTON JUSTICES
Div. Ct. 505

LICENSING ACTS—*continued.*

2. —— *Justices—Bias—Reference of Renewal of Licence to Quarter Sessions—Right of Licensing Justice to sit on Compensation Committee—Licensing Act*, 1904 (4 *Edw.* 7, *c.* 23), *s.* 1, *sub-s.* 2; *s.* 5, *sub-s.* 6.

A justice of a borough who has been appointed a member of the committee of quarter sessions under s. 5, sub-s. 5, of the Licensing Act, 1904, is not disqualified from acting on the question of the refusal of the renewal of a licence by the fact that he presided at the meeting of the licensing justices of the borough at which it was decided to refer the question of the renewal of that licence to quarter sessions under s. 1, sub-s. 2, of the Act. THE KING *v.* CHESHIRE LICENSING JUSTICES. *Ex parte* KAY'S ATLAS BREWERY, LIMITED - - - - **Div. Ct. 362**

3. —— *Justices — Committee of Quarter Sessions acting as Compensation Authority — Power to state Case — Licensing Act*, 1904 (4 *Edw.* 7, *c.* 23), *ss.* 1, 5.

The committee of quarter sessions appointed under the Licensing Act, 1904, for confirming the grants of new licences and determining any questions as to the refusal of the renewal of licences under the Act has power to state a case for the opinion of the King's Bench Division. THE KING *v.* SOUTHAMPTON LICENSING JUSTICES. *Ex parte* CARDY - **Div. Ct. 446**

4. —— *Licence — Renewal — Reference to Quarter Sessions—Report of Licensing Justices —Admissibility of Report as evidence before Quarter Sessions—Licensing Act*, 1904 (4 *Edw.* 7, *c.* 23), *s.* 1, *sub-s.* 2.

Although the report made by licensing justices under s. 1, sub-s. 2, of the Licensing Act, 1904, on a reference by them to quarter sessions of an application for the renewal of a licence has to be considered by the quarter sessions, it is not evidence upon which that Court is entitled to act in dealing with the application. The quarter sessions can only act upon evidence upon oath before them. DARTFORD BREWERY COMPANY *v.* COUNTY OF LONDON QUARTER SESSIONS - - - - - - **Ridley J. 695**

5. —— *Licence — Renewal — Reference to Quarter Sessions —Report of Renewal Authority —Evidence at Quarter Sessions —Cross-examination as to licensed Houses not included in Report —Licensing Act*, 1904 (4 *Edw.* 7, *c.* 23), *s.* 1.

Where the question of the renewal of an existing on-licence is referred to quarter sessions by the renewal authority, with their report thereon, under s. 1 of the Licensing Act, 1904, the Court of quarter sessions ought not, on the hearing of the matter, to refuse to allow a cross-examination on behalf of the licence-holder of the witnesses called by the renewal authority, if the ground of that refusal be merely that the questions sought to be put in cross-examination relate to other licensed houses in the neighbourhood which are not included in the report of the renewal authority. MORGAN *v.* AYLESFORD LICENSING JUSTICES - - - **Div. Ct. 437**

6. —— *Offences—Sale of Beer in unlicensed Place—Liability of Licensee—Sale by Servant—Scope of Employment—Licensing Act*, 1872 (35 & 36 *Vict. c.* 94), *s.* 3.

The respondent, who was licensed to sell by retail, at his brewery, beer for consumption off the premises, employed a drayman to deliver beer to customers. The drayman had no authority to sell any beer for the respondent, his sole duty being to deliver beer to customers only who had previously given orders for it, and he had been expressly ordered not to sell or deliver beer to other persons, and to bring back to the brewery any beer which he was unable to deliver. The drayman sold and delivered some bottled beer from his van to persons in a street who had not previously ordered it :—

Held, that the respondent was not liable to be convicted under s. 3 of the Licensing Act, 1872, which prohibits, under penalties, any person licensed to sell by retail intoxicating liquor from selling the same at any place where he is not authorized by his licence so to do. BOYLE *v.* SMITH - - - - - - **Div. Ct. 432**

7. —— *Offences—Selling Intoxicating Liquor without Licence—Offence of Trifling Nature—Summary Jurisdiction Act*, 1879 (42 & 43 *Vict. c.* 49), *s.* 16.

For an incoming tenant of a public-house to carry on the business of the house for a period of nine days without a licence is a serious offence; and the facts that the outgoing tenant had been duly licensed, and that for nine days after his departure, the period in question, no sessions sat at which a temporary transfer of his licence could be applied for, do not warrant a Court of summary jurisdiction in treating the offence as one of a trifling nature within the meaning of s. 16 of the Summary Jurisdiction Act, 1879. BARNARD *v.* BARTON **Div. Ct. 357**

8. —— *Provisional Licence—Grant for Seven Years from Final Order—Validity of—Licensing Act*, 1874 (37 & 38 *Vict. c.* 49), *s.* 22—*Licensing Act*, 1904 (4 *Edw.* 7, *c.* 23), *s.* 4, *sub-s.* 3.

Sect. 4, sub-s. 3, of the Licensing Act, 1904, which provides that "the justices may, if they think fit, instead of granting a new on-licence as an annual licence, grant the licence for a term not exceeding seven years," applies as well to a provincial licence under s. 22 of the Licensing Act, 1874, in respect of a house about to be built as to an ordinary licence for an existing house. Such a provisional licence is not operative as a licence until the house has been completed and the final order made, and consequently a grant of a provisional licence to be in force for seven years from the date of the final order is a grant of a licence "for a term not exceeding seven years" within the meaning of the above section. THE KING *v.* JOHNSTONE **Div. Ct. 228**

—— Excise—Beer—Soliciting or taking order at place other than that specified in licence - - - - - - **266**
See REVENUE. 3.

LIFE INSURANCE.
See under INSURANCE, LIFE.

LIMITATIONS, STATUTE OF—Pauper lunatic —Maintenance—Lunatic's estate—Payments on account - - - - **420**
See POOR LAW. 2.

LIQUIDATED DAMAGES.
See under DAMAGES.

LIQUIDATOR—Denial of liability by—Voluntary winding-up —Stay of proceedings in action - - - - - - - **134**
See COMPANY. 3.

LOAN—Excessive interest —Risk—"All the circumstances" - - - - - **79**
See MONEY-LENDER. 2.

LOCAL AUTHORITY.
See under LOCAL GOVERNMENT.

LOCAL GOVERNMENT—*Cleansing of Privies and Cesspools—Power of Local Authority to undertake Duty of—Public Health Act*, 1875 (38 & 39 *Vict. c.* 55), *s.* 42.

A local authority may, under s. 42 of the Public Health Act, 1875, undertake the cleansing of earth-closets, privies and ashpits in their district without at the same time undertaking the cleansing of cesspools. STAINLAND AND HOLYWELL GREEN INDUSTRIAL CORN AND PROVISION SOCIETY *v.* STAINLAND WITH OLD LINDLEY URBAN DISTRICT COUNCIL
Div. Ct. 233

2. —— *Compensation—Transfer of Powers of London School Board to London County Council —Direct Pecuniary Loss—Officer of Authority whose Powers not transferred—Education Act*, 1902 (2 *Edw.* 7, *c.* 42), *Sched. II., rr.* 16, 21—*Local Government Act*, 1888 (51 & 52 *Vict. c.* 41), *s.* 120.

Before the Education Act, 1902, came into operation in London the expenses of the London School Board were defrayed out of the consolidated rate, which was raised in the City of London by a precept directed to the Corporation of the City, and was collected for the Corporation by the applicant, who received a commission on the amount collected. When the Act came into operation the powers of the London School Board were transferred to the London County Council, and the education expenses were defrayed out of the poor-rate, which was collected by the overseers. The applicant, having thus lost a proportion of the commission he formerly earned, claimed compensation under r. 21 of Sched. II. of the Education Act, 1902, and s. 120 of the Local Government Board, 1888 :—

Held, by Lord Alverstone C.J. and Ridley J. (Darling J. dissenting), that he was not entitled to compensation from the London County Council, since none of the powers or property of the Corporation of the City of London, whose officer he was, had been transferred to the County Council. THE KING *v.* LONDON COUNTY COUNCIL. *Ex parte* NORRIS
Div. Ct. 346

—— Liability of local authority—Discharge of patient while still infectious - **160**
See HOSPITAL.

—— Street—Making-up—Power to charge frontagers residing outside of local authority. *See* STREET. **521**

LOCOMOTIVE — Traction engine — Excessive weight—Injury to water main - **167**
See HIGHWAY. 2.

LODGER—Franchise—"Inhabitant occupier" or "lodger" - - - - - - **60**
See PARLIAMENT. 1.

LONDON—*House Refuse, Removal of—Failure of Sanitary Authority to remove—Reasonable Cause—Public Health (London) Act*, 1891 (54 & 55 *Vict. c.* 76), *s.* 30.

By a by-law of the London County Council, made under s. 16 of the Public Health (London) Act, 1891, it was provided that, where a sanitary authority arranged for the daily removal of house refuse in their district or in any part of it, the occupier of any premises therein should, at such hour of the day as the sanitary authority should fix and notify by public announcement, deposit on the kerbstone or outer edge of the footpath immediately in front of the house or in a conveniently accessible position on the premises as the sanitary authority might prescribe by written notice served upon the occupier, a movable receptacle in which the house refuse should be placed for the purposes of removal. A sanitary authority, desiring to start a system of daily removal of house refuse, and assuming to act under the by-law, gave notice by means of a printed notice to all the occupiers of houses within a specified area, requiring them to deposit on the kerbstone or edge of the footpath immediately in front of their respective houses a movable receptacle in which should be placed for the purposes of removal the house refuse which had accumulated since the preceding collection; the notice contained a statement that the dustmen were prohibited from going on the premises for dust in the streets within the prescribed area.

An occupier of a detached house standing back forty feet from the highway, and approached by a carriage drive, who had a conveniently accessible position on his premises in which he was willing to put his house refuse in a movable receptacle for purposes of removal, refused to comply with the notice by placing his house refuse in a receptacle on the kerbstone, and the sanitary authority refused to remove his house refuse from his premises, notwithstanding the service upon them by him of a written notice, under s. 30 of the Public Health (London) Act, 1891, requiring them to do so. A summons was taken out under s. 30, sub-s. 2, of that Act by the occupier against the sanitary authority for unlawfully and without reasonable cause failing to comply with the notice to remove the house refuse from his premises, and the sanitary authority were convicted of the offence charged :—

Held, that the notice was not a proper prescription of a conveniently accessible position as contemplated by the by-law, as it went beyond the by-law in prescribing that every occupier within a given area must place his house refuse in a receptacle on the kerbstone; that the sanitary authority had therefore failed without reasonable cause to discharge their statutory duty of securing the removal of the house refuse from the premises of the occupier, he being

LONDON—*continued.*

willing to place it in an accessible position from which they could conveniently remove it, and that the conviction was right. WANDSWORTH CORPORATION *v.* BAINES - - **Div. Ct. 470**

2. —— *Offence—Unsound Meat—Information by Sanitary Inspector—Necessity for Authority—Right of private Person to prosecute—Public Health (London) Act*, 1891 (54 *&* 55 *Vict. c.* 76), *s.* 47, *sub-s.* 2 ; *s.* 107, *sub-s.* 3 ; *s.* 123.

The respondent, a sanitary inspector of a borough council, entered the premises of the appellant, a butcher, and seized certain meat, which was then taken before a magistrate and by him condemned as unsound and ordered to be destroyed. On the same day a summons was issued on an information laid by the respondent under s. 47, sub-s. 2, of the Public Health (London) Act, 1891, charging the appellant with having the meat in his possession for the purpose of sale. Both the information and the summons stated that the respondent was acting on behalf of the borough council, but he had not been expressly authorized by the council to take proceedings against the appellant. The appellant was convicted :—

Held, affirming the conviction, that a private person can prosecute for an offence under s. 47, sub-s. 2, and that the absence of authority on the part of the respondent did not invalidate the proceedings, the words "on behalf of" the borough council in the information and summons being mere surplusage.

Allman v. *Hardcastle*, (1903) 2 L. G. R. 13, followed. GIEBLER *v.* MANNING **Div. Ct. 709**

3. —— *Paving—Passage not being a Thoroughfare—Requirement of Owner to pave a second time with different Material—Metropolis Management Act*, 1855 (18 *&* 19 *Vict. c.* 120), *ss.* 99, 100.

The owner of a court, passage, or public place, not being a thoroughfare, who has once in obedience to a notice in that behalf under s. 100 of the Metropolis Management Act, 1855, paved or covered the same to the satisfaction of the vestry, cannot be called upon a second time to pave or cover it with a different material ; all he can be required to do is to repair the existing pavement or covering. HARRISON *v.* OWNER OF NEW STREET MEWS - - **Div. Ct. 703**

4. —— *Water-closets—Repairing Apparatus of existing Water-closets—Requirement of Notice to Sanitary Authority before doing so—Public Health (London) Act*, 1891 (54 *&* 55 *Vict. c.* 76), *s.* 39, *By-laws under—By-laws* 5, 14.

By-law 14 of the by-laws made under s. 39 of the Public Health (London) Act, 1891 : "Every person who shall intend to construct any water-closet . . . . or to fit or fix in or in connection with any water-closet any apparatus or any trap or soil pipe, shall before executing any such works give notice in writing to the clerk of the sanitary authority " :—

Held, that the by-law applied to a person intending to renew the pan or trap of a water-closet constructed before, as well as of a water-closet constructed after, the making of the by-law. LONDON AND SOUTH WESTERN RAILWAY COMPANY *v.* HILLS - - **Div. Ct. 512**

LUNACY — Pauper lunatic — Maintenance — Lunatic's estate—Payments on account *See* POOR LAW. 2. **420**

MAGISTRATES.
See under JUSTICES.

MAINTENANCE — Pauper lunatic — Lunatic's estate—Payment on account - **420**
See POOR LAW. 2.

MALICE — Magistrate — "Judge" — Slander — Privilege - - - - - **487**
See DEFAMATION.

MARINE INSURANCE.
See under INSURANCE, MARINE.

MARRIED WOMAN.
See under HUSBAND AND WIFE.

MASTER AND SERVANT.
See under EMPLOYER AND WORKMEN.

MEASURES—WEIGHTS AND.
See under WEIGHTS AND MEASURES.

MEAT—Offences—Unsound meat—Information by sanitary inspector—Necessity for authority - - - - - **709**
See LONDON. 2.

MERCHANDISE MARKS—*False Trade Description—Merchandise Marks Act*, 1887 (50 *&* 51 *Vict. c.* 28), *ss.* 2, 3.

Where the generic name of certain commodities has by the usage of the trade come to be confined to a particular species, the fact that the application of that name to another species is literally correct will not prevent it from being a false trade description within the meaning of s. 3, sub-s. 1, of the Merchandise Marks Act, 1887.

Washing soda and Glauber's salt are both salts of soda in a crystalline form ; but the description "soda crystals" is by the usage of the trade of manufacturing chemists applied only to the former. The appellant sold Glauber's salt under the name of "soda crystals" :—

Held (by Lord Alverstone C.J. and Wills J., Darling J. dissenting), that he had applied to the goods a false trade description. FOWLER *v.* CRIPPS - - - - - - **Div. Ct. 16**

METROPOLIS.
See under LONDON.

MILLDAM—Fishery district—River—Tributary, What is—Licence - - - **516**
See FISHERY ACTS. 1.

MINES—*Compensation—Railway Company—Coal required to be left unworked—Railways Clauses Consolidation Act*, 1845 (8 *&* 9 *Vict. c.* 20), *s.* 78.

In 1886 a coal company obtained a lease entitling them to carry away all the coal within and under certain lands for a term of twenty-one years. In 1887 a railway company by a special Act, which incorporated the Railways Clauses Consolidation Act, 1845, obtained power to construct a railway over these lands, and the

MINES—*continued.*
railway was made accordingly. In 1892 the coal company, being desirous of working the coal under the railway, gave notice to the railway company under s. 78 of the Railways Clauses Consolidation Act, 1845, and were required by them to leave unworked certain coal which in the ordinary course they would have worked. It would not, however, have been possible for them within the time of their lease to have worked out all the coal lying under the lands leased to them, and the effect of the requirement of the railway company was to cause the coal company to get other coal from under such lands at an increased cost:—

Held, that the proper measure of compensation to the coal company and to the reversioners was the profit which they would respectively have made on the coal which was by the requirement of the railway company left unworked, and not the injury which they respectively suffered by the interference with the working of the coal under the demised lands. JAMES JOICEY & CO. AND EXECUTORS OF S. A. D. EDEN *v.* NORTH EASTERN RAILWAY COMPANY - - - - - - **195**

MONEY-LENDER — *Definition — Exception — "Business not having for its primary Object the lending of Money"—Discounting Bills of Customers and Friends—Financing a Business—Money-lenders Act*, 1900 (63 & 64 *Vict. c.* 51), *s.* 6, *sub-s.* (*d*).

The Money-lenders Act, 1900, s. 6, defines a money-lender to be "every person whose business is that of money-lending, or who . . . . holds himself out in any way as carrying on that business," but excepts sub-s. (*d*), "any person bona fide carrying on any business not having for its primary object the lending of money, in the course of which and for the purposes whereof he lends money."

A. carried on business as an art dealer for many years prior to 1903, and in the course of his business it was necessary and incidental thereto to give long credit and to take from his customers bills in payment of the amounts they owed to him for their purchases, and to discount and renew the bills from time to time. In 1903 he retired from the business and sold off his stock by public auction, and took bills for the greater part of the purchase-moneys, which he discounted and renewed from time to time, and some of which were still running. After his retirement he carried on business as an expert art valuer and adviser, and he also assisted two art businesses, in which he was largely interested, by discounting for them their customers' bills and by taking bills for the interest from time to time due on the debentures he held in one of those businesses. He also assisted some old friends in the curio trade, and a few persons with whom he had been connected in business, about ten in all, with loans and by discounting bills for them. He did not advertise as a money-lender, and did not discount bills for any outsiders. In an action by A. on bills given him in 1904 for a loan made by him to an old customer:—

Held, that A. was not, and never had been, a

MONEY-LENDER—*continued.*
money-lender within the meaning of s. 6 of the Money-lenders Act, 1900; and that, as to the bills given on the sale of his stock and renewed and still running, he came within exception (*d*) in the section. LITCHFIELD *v.* DREYFUS
Farwell J. 584

2. —— *Loan Transaction—Excessive Interest—Risk — "All the Circumstances" — Money-lenders Act*, 1900 (63 & 64 *Vict. c.* 51), *s.* 1, *sub-s.* 1.

The defendant, a director of a company with an income of 1000*l.* a year and possessed of furniture and pictures of considerable value, being in want of 150*l.* in order to pay sundry creditors, but not being in great necessity, as his creditors, though pressing for payment, were not threatening proceedings, obtained a loan of 150*l.* from the plaintiffs, who were money-lenders, and gave them two promissory notes, one for 150*l.* and one for 72*l.*, repayable respectively by twelve and six equal monthly instalments. The notes each contained a default clause, the nature and effect of which the defendant clearly understood, providing that on default of payment of any instalment the whole of the amount of the note then remaining unpaid should become due and payable. The interest on the loan worked out at 75 per cent. per annum. The plaintiffs obtained no security for the loan, but at the time were informed by the defendant as to his financial position. The defendant paid off all the instalments of the 72*l.* note, and, after paying seven instalments of the 150*l.* note, made default, and on being sued for 62*l.* 10*s.*, the balance, claimed relief under the Money-lenders' Act, 1900:—

Held, that although the rate of interest was high, that fact did not of itself necessarily render the transaction "harsh and unconscionable," and that, having regard to the risk and to all the circumstances of the case, amongst which the Court was entitled to consider the fact that the defendant understood the transaction, and without any misrepresentation or pressure by the plaintiffs voluntarily agreed to pay the interest asked, 75 per cent. per annum was a reasonable rate of interest, and not "excessive" within the meaning of the Act, and the transaction was not "harsh and unconscionable," and that the defendant was therefore not entitled to relief. CARRINGTONS, LIMITED *v.* SMITH
Channell J. 79

MONUMENT — Erection of — Fees — Burial ground - - - - - - **338**
See BURIAL.

MORTGAGE—Lease by mortgagor in possession —Surrender of lease to mortgagee—Rights of mortgagee - - - **125**
See LANDLORD AND TENANT. 2.

—— Ship—Invalid mortgage—Registration of—Power of Court to expunge from register - - - - - **571**
See SHIPPING. 3.

NEGLIGENCE—Guardians—Negligence of servant—Liability of guardians to pauper inmate in action of tort - - **538**
See POOR LAW. 1.

NOTICE—Water-closets, Repairing apparatus of existing — Requirements of notice — Sanitary authority - - - - **512**
See LONDON. 4.

NUISANCE — Oyster ponds on foreshore — Ancient user—Nuisance from sewage—Public health - - - - - **648**
See FISHERY. 2.

OBSCENE LIBEL.
See under LIBEL.

OFFENCES—Licensing Acts.
See under LICENSING ACTS.

—— Unsound meat—Information by sanitary inspector—Necessity for authority **709**
See LONDON. 2.

OFFICER—Trade Union—Liability to penalties —Absence of fraud - - - **534**
See TRADE UNION.

OYSTERS—Ponds on foreshore—Ancient user—Public health—Discharge of sewage into the sea - - - - - - **648**
See FISHERY. 2.

PARLIAMENT — *Franchise — Dwelling-house—Part of House — "Inhabitant Occupier" or "Lodger"—Resident Landlord—Representation of the People Act*, 1867 (30 & 31 *Vict. c.* 102), *s.* 3, *sub-s.* 2, *s.* 4—*Parliamentary and Municipal Registration Act*, 1878 (41 & 42 *Vict. c.* 26), *s.* 5—*Representation of the People Act*, 1884 (48 & 49 *Vict. c.* 3), *ss.* 2, 7.

In determining whether a person resident in part of a house is an "inhabitant occupier" under s. 3, sub-s. 2, or a "lodger" under s. 4 of the Representation of the People Act, 1867, the fact that the landlord lives on the premises is not, of itself, conclusive that the person so resident can only be entitled to the franchise in respect of a lodger qualification, and cannot be entitled as possessing a household qualification. KENT *v.* FITTALL - - - - **C. A. 60**

2. —— *Franchise — Registration — Borough Vote—Description of Occupier—Omission of One of Two Christian Names—Power to Amend—Parliamentary and Municipal Registration Act*, 1878 (41 & 42 *Vict. c.* 26), *ss.* 24, 28.

Where objection was duly taken before a revising barrister to the name of a certain voter being retained on division 1 of the list of voters for a borough, and it was proved that the second Christian name of the voter had been omitted on the list, but he made no declaration of misdescription as provided in s. 24 of the Parliamentary and Municipal Registration Act, 1878 :—

Held, that the revising barrister had power under s. 28, sub-s. 1, to amend the mistake and insert the voter's full name on the list. GREEN *v.* WANKLYN - - - - **Div. Ct. 394**

3. —— *Registration—County Vote — Service Franchise — Occupation of Servant excluding Occupation of Master—Representation of the People Act*, 1832 (2 & 3 *Will.* 4, *c.* 45), *s.* 24—*Representation of the People Act*, 1884 (48 & 49 *Vict. c.* 3), *s.* 3.

Sect. 3 of the Representation of the People

PARLIAMENT—*continued.*

Act, 1884 (which provides that where a man inhabits any dwelling-house by virtue of any office, service or employment, he shall be deemed for the purposes of the Representation of the People Acts to be an inhabitant occupier of such dwelling-house as a tenant), does not operate to exclude the legal occupation of the man's employer so as to give that employer, being the freeholder, a freehold vote for the county in respect of the dwelling-house. BROOKS *v.* BAKER - - - - - **Div. Ct. 11**

PARLIAMENTARY AND MUNICIPAL REGISTRATION ACT.
See under PARLIAMENT.

PASSAGE—Not being a thoroughfare—Requirement of owner to pave a second time with different material - - **703**
See LONDON. 3.

PAVING—Passage not being a thoroughfare—Requirement of owner to pave a second time with different material - **703**
See LONDON. 3.

PAYMENT OUT OF COURT—Practice - **563**
See PRACTICE. 1.

PENALTIES—Trade Union—Officer—Liability —Absence of fraud - - - **534**
See TRADE UNION.

PENALTY—Liquidated damages or—Forfeiture of sum deposited - - - - **425**
See CONTRACT.

PHARMACY ACTS—*Sale of Poisons—Pharmaceutical Society—Powers—Resolution—"Ought to be deemed a Poison"—Pharmacy Act*, 1868 (31 & 32 *Vict. c.* 121), *ss.* 2, 17, *Sched. A.*

The appellant, a registered chemist, was convicted of selling veratrine, a poison, without having complied with the provisions of s. 17 of the Pharmacy Act, 1868, applicable to the sale of poisons within Part 1 of Sched. A to the Act. Veratrine is a poisonous vegetable alkaloid, and therefore a poison within Part 1 of Sched. A. The veratrine in question formed one of the ingredients of an ointment sold by the appellant for the destruction of vermin. In 1869 the Pharmaceutical Society in pursuance of s. 2 of the Act declared by resolution that every compound containing any poison within the meaning of the Act, when sold for the destruction of vermin, should be deemed a poison within the Act, but did not place these compounds in Part 1 of Sched. A :—

Held, that the Pharmaceutical Society has power to declare that a compound containing as one of its ingredients a poison mentioned in Part 1 of Sched. A ought to be deemed a poison within Part 2 of Sched. A ; that the article sold by the appellant was a poison within Part 2 of Sched. A, and that the conviction was, therefore, wrong. BROWN *v.* LEGGETT **Div. Ct. 330**

PLEADING—Striking out—Reasonable cause of action - - - - - - **487**
See DEFAMATION.

POISON — Sale of — Pharmaceutical Society — Powers — Reservation — "Ought to be deemed a poison" - - - **330**
See PHARMACY ACTS.

POLICY—Insurance.
See under INSURANCE, MARINE.

POOR LAW—*Guardians—Negligence of Servant—Liability of Guardians to Pauper Inmate in Action of Tort—Common Employment.*

The defendants, a board of guardians of the poor, were carrying out an enlargement of the electric light installation at their workhouse by means of their own servants, the work being done under the supervision of their engineer, a permanent official of the workhouse. The plaintiff, a pauper inmate of the workhouse, was ordered by the labour-master to assist in the work, and was put to work on a staging some distance above the ground; while at work the staging, for the safety of which the engineer was responsible, gave way owing to its negligent and improper construction, and the plaintiff was injured. In an action against the guardians to recover damages for negligence :—

Held, first, that the defence of common employment afforded no answer to the action, for the plaintiff as a pauper inmate was compelled to obey the order to assist in the work and could not be held to have taken upon himself the risk of injury from the negligence of the defendants' servants; and, secondly, that the work was not being carried out by the defendants in the discharge of their administrative duties as guardians, and that therefore the action was maintainable.

Levngston v. *Lurgan Guardians*, (1868) I. R. 2 C. L. 202, and *Brennan* v. *Limerick Guardians*, (1878) 2 L. R. Ir. 42, considered. TOZELAND *v.* WEST HAM UNION - - - **Div. Ct. 538**

2. —— *Pauper Lunatic — Maintenance — Lunatic's Estate — Payments by Receiver in Lunacy—Death of Lunatic—Arrears of Maintenance—Payments on Account—Appropriation—Limitations Act*, 1623 (21 *Jac.* 1, *c.* 16), *s.* 3.

A lunatic not so found by inquisition was maintained in a pauper lunatic asylum by the guardians of a union from 1876 until her death in 1904 at an annual cost of about 21*l.* The lunatic was entitled to property producing about 8*l.* per annum. By an order in lunacy a receiver was appointed of this income of the lunatic, and was directed to apply the same in and for the maintenance and benefit of the lunatic. Pursuant to this order the receiver paid the income to the guardians from 1887 to 1903 for the maintenance of the lunatic, and the guardians in their books appropriated each payment of the receiver as a payment on account of the arrears of maintenance due to them at the date of each payment. At the death of the lunatic considerable arrears of maintenance were due to the guardians, and in an action by them against the administratrix of the lunatic for these arrears the administratrix contended that the guardians were only entitled to six years' arrears prior to the date of the writ :—

Held, that under the circumstances the payment by the receiver took the case out of the Statute of Limitations, and that the guardians were entitled to payment of all the arrears due to them.

In re Newbigin's Estate, (1887) 36 Ch. D. 477, and *In re Watson*, [1899] 1 Ch. 72, distinguished. GUARDIANS OF WANDSWORTH UNION *v.* WORTHINGTON - - - **Farwell J. 420**

POOR RATE.
See under RATES.

POSSESSION, WRIT OF—Costs—Jurisdiction to make order - - - - - **462**
See COSTS.

POST OFFICE—*Telegraph Department—Wrongful Act of Subordinate Official—Action against Postmaster-General in Official Capacity—Immunity from Action—Telegraph Act*, 1863 (26 *&* 27 *Vict. c.* 112), *ss.* 18, 42—*Telegraph Act*, 1868 (31 *&* 32 *Vict. c.* 110), *ss.* 2, 4—*Telegraph Act*, 1878 (41 *&* 42 *Vict. c.* 76), *s.* 11.

The Postmaster-General is not liable in his official capacity, as head of the telegraph department of the Post Office, for wrongful acts done by his subordinates in carrying on the business of the department. BAINBRIDGE *v.* POSTMASTER-GENERAL - - - - **C. A. 178**

PRACTICE—*Payment into Court without Denial of Liability—Action of Libel—Death of Defendant—Abatement of Action — Application by Defendant's Executors for Payment out of Money—Rules of Supreme Court, Order XXII. rr.* 1, 5.

In an action of libel the defendant paid money into Court in satisfaction of the claim, without denying liability. The plaintiff did not take the money out of Court, and proceeded with the action. The action being yet untried, the defendant died, and the action therefore abated. The defendant's executors thereupon applied for an order that the money in Court should be paid out to them :—

Held, that their application should be refused and the money paid out to the plaintiff. BROWN *v.* FEENEY - - - - - **C. A. 563**

2. —— *Service out of the Jurisdiction—Writ of Summons—Contract "which ought to be performed within the Jurisdiction"—Breach within the Jurisdiction—Agent for Foreign Principal—Employment in England and elsewhere—Implied Covenant not to prevent Agent acting—Breach in England—Order XI., r.* 1 (*e*).

By an agreement between the plaintiffs, who were insurance agents in London, and the defendants, a Spanish insurance company, entered into at Teneriffe, where the latter were domiciled, the defendants agreed to employ the plaintiffs as their exclusive representatives for a period of five years in England and elsewhere. At the end of one year the defendants sent their agent-general to England, with authority to revoke the agreement, which he did by notice in writing sent through the London post to the plaintiffs at their place of business. An action for breach of contract was thereupon commenced, and an order for service out of the jurisdiction was obtained. On appeal from the refusal of a judge at chambers to set aside the writ and subsequent proceedings :—

Held, that there was to be implied from the agreement a contract by the defendants not to

PRACTICE—*continued.*
do anything to prevent the plaintiffs from acting as their representatives in England during the agreed term; that the action was therefore founded on a breach within the jurisdiction of a contract which, according to the terms thereof, ought to be performed within the jurisdiction, and that the order for service out of the jurisdiction was rightly made under Order XI., r. 1 (*e*). MUTZENBECHER *v.* LA ASEGURADORA ESPAÑOLA - - - - - - **C. A. 254**

3. —— *Staying Action—Cause of Action arising out of the Jurisdiction—Action brought Vexatiously and Oppressively—Accessible Court where Cause of Action arose.*
The Court will stay an action, brought within the jurisdiction, in respect of a cause of action arising out of the jurisdiction, if satisfied that no injustice will be done thereby to the plaintiff, and that the defendant would be subject to such injustice in defending the action as would amount to vexation and oppression, to which he would not be subjected if an action were brought, in another and accessible Court, where the cause of action arose. LOGAN *v.* BANK OF SCOTLAND (No. 2) - - **C. A. 141**

—— Appeal.
See under APPEAL.

—— Costs.
See under COSTS.

—— County court.
See under COUNTY COURT.

—— Discovery.
See under DISCOVERY.

—— Receiver.
See under RECEIVER.

—— Stay of proceedings in action—Company—Voluntary winding-up—Denial of liability by liquidator - - - **134**
See COMPANY. 3.

PRESUMPTION—Oyster ponds on foreshore—Ancient user—Presumption of legal origin—Nuisance from sewage - **648**
See FISHERY. 2.

PRINCIPAL AND AGENT—*Borrowing by Agent—Excess of Authority—Debt of Principal paid with Money borrowed—Relief of Lender in Authority of Agent—Equitable Right of Lender to Recover.*
The defendants, a country firm, opened a branch of their business in London, and appointed an agent to carry it on. The defendants had an account with a London bank in their name, upon which the agent was entitled to draw. The agent had no authority to borrow money, but the banking account being low, he borrowed a sum of money of the plaintiff, who was told that it was for the use of the firm, and believed that the agent had authority to borrow. The money was paid into the bank, and part of it was used by the agent in the payment of obligations of the defendants. Subsequently the defendants supplied further sums of money, which would have been sufficient to meet their obligations, but for the agent drawing, on his own account, sums to which he was not entitled.

PRINCIPAL AND AGENT—*continued.*
The agent meanwhile borrowed other sums of money of the plaintiff, portions of which were alleged to have been used in discharging further obligations of the defendants. In an action to recover the amount so borrowed:—
Held that, to the extent to which the money borrowed should be found on inquiry to have been in fact applied in paying legal debts of the defendants, the plaintiff was entitled in equity to stand in the same position as if that amount had been originally borrowed by them. BANNATYNE *v.* D. & C. MACIVER - - **C. A. 103**

—— Writ of summons—Service out of the jurisdiction - - - - - **254**
See PRACTICE. 2.

PRIORITY — Company — Debenture-holder — Receiver—Judgment creditor — Garnishee order nisi—Priority - - **112**
See COMPANY. 1.

PRIVATE INTERNATIONAL LAW.
See under CONFLICT OF LAWS.

PRIVIES—Cleansing of, and cesspools—Power of local authority to undertake duty of - - - - - - **233**
See LOCAL GOVERNMENT. 1.

PRIVILEGE — Distress — Cab — Implement of trade - - - - - - **480**
See DISTRESS. 1.

—— Magistrate—"Judge"—Slander—Criminal charge—Malice - - - - **487**
See DEFAMATION.

PROMISSORY NOTE — Stamp—Treasury note of foreign Government — Marketable security—Debenture - - - **318**
See REVENUE. 8.

PUBLIC HEALTH—Cleansing of privies and cesspools—Power of local authority to undertake duty of - - - **233**
See LOCAL GOVERNMENT. 1.

—— House refuse, removal of—Failure of sanitary authority to remove - **470**
See LONDON. 1.

—— Infectious hospital—Discharge of patient while still infectious—Liability of local authority - - - - - - **160**
See HOSPITAL.

—— Offence—Unsound meat—Information by sanitary inspector—Necessity for authority - - - - - - - **709**
See LONDON. 2.

—— Oyster ponds on foreshore—Ancient user—Nuisance from sewage - - **648**
See FISHERY. 2.

—— Street—Making up - - - - **521**
See STREET.

PUBLIC HEALTH (LONDON)—Water-closets—Repairing apparatus of existing—Requirement of notice - - **512**
See LONDON. 4.

PUBLICATION—Tending to prejudice fair trial—Contempt of inferior Court—Jurisdiction of King's Bench Division to attach for - - - - - **32**
See CONTEMPT OF COURT.

QUARTER SESSIONS—Evidence at—Licence—Renewal — Cross-examination as to licensed houses not included in report *See* LICENSING ACTS. 5. 437

—— Highways. *See* under HIGHWAY.

—— Licensing Acts—Compensation authority—Appeal to quarter sessions of county *See* LICENSING ACTS. 1. 505

—— Power to state case - - - - - 446 *See* LICENSING ACTS. 3.

—— Renewal of licence — Admissibility of report as evidence before quarter sessions - - - - - - 695 *See* LICENSING ACTS. 4.

QUIET ENJOYMENT—Covenant for—Lease—Breach of covenant—Interruption by assignee - - - - - - 155 *See* LANDLORD AND TENANT. 1.

RAILWAY — *Rates — Short Distance — Merchandise "conveyed" by the Company partly on its own Railway and partly on another Railway.*

By clause 11 of the schedule to the London and North Western Railway Company (Rates and Charges) Order Confirmation Act, 1891 (54 & 55 Vict. c. ccxxi.), where merchandise is conveyed for an entire distance which does not exceed a certain specified distance (varying according as station terminals are chargeable at one end or at both ends of the transit, or at neither), the company may make the charges for conveyance authorized by the schedule as for the specified distance: "Provided that where merchandise is conveyed by the company partly on the railway and partly on the railway of any other company, the railway and the railway of such other company shall for the purpose of reckoning such short distance be considered as one railway":—

Held, that the expression "conveyed" in the proviso refers, not to the contract of carriage, but to the physical haulage, and that if during the portion of the transit which takes place on the railway of the other company the goods are hauled by the engines of that other company, the proviso does not apply, notwithstanding that the goods were delivered to the London and North Western Railway Company to be carried to their destination at a through rate. LANCASHIRE AND CHESHIRE COAL ASSOCIATION AND RICHARD EVANS & CO. *v.* LONDON AND NORTH WESTERN RAILWAY COMPANY AND LANCASHIRE AND YORKSHIRE RAILWAY COMPANY - **Bigham J. 577**

—— Coal required to be left unworked—Compensation - - - - - - 195 *See* MINES.

—— Poor rate—Rateable value—Interest on cost of construction - - - - - 597 *See* RATES. 3.

RATES—*Outgoing Occupier—Apportionment of Rate—Demand—Distress Warrant.*

A poor rate having been made and duly demanded of a ratepayer, he subsequently during the currency of the half-year for which the rate was made went out of occupation, and thereby became liable to pay only so much of the rate as was proportionate to the time of his occupation. No fresh demand for a proportion of the rate was made upon him, but he neither paid nor tendered any portion of it. On a summons for non-payment of the rate the justices ascertained the proportion which was due, and forthwith issued their distress warrant for that amount:—

Held, that they had no jurisdiction to do so. MANSEL *v.* ITCHEN OVERSEERS - **Div. Ct. 221**

2. —— *Poor Rate — Assessment — Sewage Farm.*

A sewerage board, being under a statutory obligation to dispose of the sewage of a district, acquired for the purpose a farm, on which they laid pipes and constructed channels for the distribution of the sewage. This farm they let to a tenant as a sewage farm. The rent reserved by the lease was a fair rent for the farm as agricultural land including the manurial value of the sewage:—

Held, that under the circumstances the reserved rent represented the true value of the farm for rating purposes, and that the rating authority when assessing its value were not entitled to take into account the benefit accruing to the sewerage board from the farm as a means of enabling them to discharge their statutory duties, notwithstanding that it was a benefit for which, if they had had to lease land for the purpose, they would have had to pay a rent. DAVIES *v.* SEISDON UNION - - **Div. Ct. 214**

3. —— *Railway — Poor Rate — Rateable Value—Interest on Cost of Construction.*

The appellants, a railway company, under an agreement with the G. Railway Company, constructed a short piece of line connecting the railway systems of the two companies for the purpose of a mutual interchange of traffic. On this piece of line there were no stations or sidings, and it originated no traffic. No railway company other than the appellants and the G. Company could have been found to acquire the line:—

Held, that for the purpose of arriving at the rateable value of the line, the capital sum expended on its construction was not an element which could be taken into consideration. GREAT CENTRAL RAILWAY COMPANY *v.* BANBURY UNION - - - - - - **Div. Ct. 597**

—— Railway rates — Short distance — Merchandise "conveyed" by the company. *See* RAILWAY - - - - 577

RECEIVER—*Practice—Equitable Execution—Appointment of Receiver — Special Circumstances—Impediments to Ordinary Execution—Defendants out of the Jurisdiction—Judicature Act*, 1873 (36 & 37 *Vict. c.* 66), *s.* 25, *sub-s.* 8.

The plaintiff in an action had obtained judgment against the defendants who were a company incorporated, and carrying on business as manufacturers, in Germany, and who had no property within the jurisdiction which could be taken in execution by any ordinary process of execution. It appeared that diverse customers

RECEIVER—*continued.*
of the defendants in this country either were, or would shortly become, indebted to the defendants for goods supplied, but the plaintiff had no means of ascertaining particulars of any such debts, and therefore could not make an affidavit in the form No. 25, Appendix B, to the Rules of the Supreme Court, in order to found garnishee proceedings; and it further appeared that there was reason to believe that the defendants were endeavouring to collect all debts due to them from customers in this country in order to avoid such proceedings:—

Held that, having regard to the special circumstances, the case was one in which a receiver of such debts as aforesaid might be appointed by way of equitable execution. GOLDSCHMIDT *v.* OBERRHEINISCHE METALLWERKE- **C. A. 373**

—— Company — Debenture-holder—Receiver—Judgment creditor — Garnishee order nisi—Priority - - - - - **112**
See COMPANY. 1.

RECEIVING ORDER — Petitioning creditor — Locus standi—Assignment for benefit of creditors - - - - - **389**
See BANKRUPTCY. 2.

REFUSE—Removal of house refuse—Failure of sanitary authority to remove - **470**
See LONDON. 1.

REGISTRATION—Bill of sale—Apparent possession—Bona fide purchase—Execution creditor - - - - - **690**
See BILL OF SALE.

—— County vote — Service franchise — Occupation of servant excluding occupation of master - - - - - - **11**
See PARLIAMENT. 3.

—— Franchise—Borough vote—Omission of one of two Christian names — Power to amend - - - - - - **394**
See PARLIAMENT. 2.

—— Ship—Invalid Mortgage—Power of Court to expunge from register - - **571**
See SHIPPING. 3.

REMOVAL — House refuse — Failure of sanitary authority to remove - - **470**
See LONDON. 1.

RENEWAL—Licence.
See under LICENSING ACTS.

REPLY—Right of plaintiff to—Practice **483**
See COUNTY COURT. 2.

REPRESENTATION OF THE PEOPLE—
See under PARLIAMENT.

REVENUE — *Carriage Tax—Exemptions—Customs and Inland Revenue Act*, 1888 (51 *&* 52 *Vict. c.* 8), *s.* 4, *sub-s.* 3.

A vehicle is not exempt from the carriage tax under s. 4, sub-s. 3, of the Customs and Inland Revenue Act, 1888, unless it is solely "constructed or adapted for use . . . . for the conveyance of any goods or burden in the course of trade or husbandry." It is not enough that it is in fact solely used for that purpose if it is constructed or adapted for use for other purposes as well.

Dictum to the contrary in *Hanworth* v. *Williams*, (1903) 67 J. P. 315, dissented from. MOORE *v.* LEWIS - - - - **Div. Ct. 27**

2. —— *Estate Duty—Property passing on Death—Settlement—Finance Act*, 1894 (57 *&* 58 *Vict. c.* 30), *s.* 5, *sub-s.* 3; *s.* 21, *sub-s.* 5—*Finance Act*, 1896 (59 *&* 60 *Vict. c.* 28), *ss.* 14, 15, *sub-s.* 1.

By a marriage settlement property, described as the husband's fortune and the wife's fortune respectively, was settled by the husband and wife upon trust (inter alia) to pay during the joint lives of husband and wife an annuity of 400*l.* to the wife for her separate use without power of anticipation and to pay the residue of the income, and after the death of the wife the whole income, to the husband for life, and after his death to pay the whole income to the wife for life, and upon trust after the death of the survivor for children of the marriage, and failing children upon trust as to the husband's fortune for him, his executors, administrators, and assigns, and as to the wife's fortune for her executors, administrators and assigns. There was no issue of the marriage, and the wife survived the husband:—

Held, that upon the death of the husband estate duty became payable upon the wife's fortune, except as to so much of it as formed part of the corpus which produced the annuity of 400*l.*

Attorney-General v. *Penrhyn*, (1900) 83 L. T. 103; *Attorney-General* v. *Strange*, [1898] 2 Q. B. 39, and *Attorney-General* v. *Wood*, [1897] 2 Q. B. 102, considered and applied. ATTORNEY-GENERAL *v.* GLOSSOP - - **Walton J. 284**

3. —— *Excise—Licence to sell Beer by Retail—Soliciting or taking Order at Place other than that specified in Licence—Inland Revenue Act*, 1867 (30 *&* 31 *Vict. c.* 90), *s.* 17.

A grocer, having an excise licence for the sale of beer by retail at one of his shops, took an order for beer at another of his shops in respect of which he had no such licence:—

Held, that he was liable to the penalty imposed by s. 17 of the Inland Revenue Act, 1867, upon persons who, without having a proper excise licence authorizing them so to do, take orders for spirits, wine, or other articles, for the dealing in, retailing or selling whereof an excise licence is by law required. ELIAS *v.* DUNLOP - - - - - **Div. Ct. 266**

4. —— *House Duty—Exemption—Dwellings for the Working Classes—"Separate Dwellings"—Revenue Act*, 1903 (3 *Edw.* 7, *c.* 46), *s.* 11, *sub-s.* 1 (*a*).

The appellants were the owners of buildings erected by them under powers conferred by the Housing of the Working Classes Act, 1890, for the purpose of providing accommodation for men of the working classes. The three upper floors consisted of separate sleeping rooms or cubicles arranged round a central hall; not more than one man was allowed to occupy each cubicle, which could be locked on the inside.

REVENUE—*continued.*

The ground floor contained dining and reading rooms, lodgers' kitchen, lavatories, and washhouse, which were used in common by the occupants of the cubicles, and also the quarters of the superintendent and staff. Each occupant paid sixpence a night for the use of the cubicle and of the other rooms and offices; he was not admitted to a cubicle before 7 p.m., and was obliged to vacate it before 8.30 a.m. on weekdays and 9 a.m. on Sundays; smoking and the use of lights in the cubicles were strictly prohibited:—

Held, that the cubicles, being only sleeping places, were not separate dwellings, and that the building, so far as it was used as a dwelling-house, was not used for the sole purpose of providing separate dwellings within the meaning of s. 11. sub-s. 1 (*a*), of the Revenue Act, 1903, and was not entitled to exemption from inhabited house duty. LONDON COUNTY COUNCIL *v.* COOK - - - - - - **Walton J. 278**

5. —— *House Duty—Offices belonging to and occupied with Dwelling-house—Exemption in favour of Buildings occupied only for Purposes of Trade or Profession*—48 *Geo.* 3, *c.* 55, *Sched. B, r.* 2—57 *Geo.* 3, *c.* 25, *s.* 1—*House Tax Act*, 1851 (14 *&* 15 *Vict. c.* 36), *Sched.*—*Customs and Inland Revenue Act*, 1878 (41 *&* 42 *Vict. c.* 15), *s.* 13, *sub-s.* 2.

The respondent was the owner and occupier of a dwelling-house with its appurtenances, and an office within the same curtilage as the dwelling-house, the office being used by him solely for the purpose of his profession as a solicitor. The dwelling-house fronted the public street, from which there was one common entrance both to the dwelling-house and the office by means of a passage under part of the dwelling-house to a yard at the back of the house; the office had been built in the yard at a later date than the dwelling-house itself. The front door of the house was in the passage, and there was an outer door at the end of the passage nearest to the street which was open all day, but was shut and locked at night, when all communication was cut off between the street and the whole of the premises, including both dwelling-house and office. There was no structural communication or covered passage between the dwelling-house and the office, which latter could only be reached from the dwelling-house by crossing the yard.

Held, that the office was occupied with, and constituted part of, the dwelling-house for the purpose of assessment to inhabited house duty, and that it did not fall within the exemption contained in s. 13, sub-s. 2, of the Customs and Inland Revenue Act, 1878, in favour of tenements occupied solely for the purposes of a trade, business, or profession. NICHOLLS *v.* MALIM **Walton J. 272**

6. —— *Income Tax—Profits of Trade—Deduction for Depreciation of Plant by Wear and Tear—Customs and Inland Revenue Act*, 1878 (41 *&* 42 *Vict. c.* 15, *s.* 12.

By s. 12 of the Customs and Inland Revenue Act, 1878, Income Tax Commissioners, in assessing trade profits or gains, are to allow "such deduction as they may think just and reasonable as representing the diminished value by reason of wear and tear during the year of any machinery or plant used for the purpose of the concern and belonging to the person or company by whom the concern is carried on."

A firm of shipowners owned a fleet of vessels of the average age of thirty-one years. Prior to the year of assessment there had been allowed yearly from the gross profits assessed to Sched. D an amount by way of deduction for diminished value by reason of wear and tear, and sums amounting in the agggregate to 96 per cent. on the first or prime cost of the vessels (including such sums as had been expended upon them by way of addition or repairs other than ordinary annual repairs) had been allowed: the existing, or breaking-up, value of the vessels during the year of assessment was more than 4 per cent. of the first or prime cost. There was no agreement between the shipowners and the Commissioners that the allowance for depreciation should be calculated on the basis of its being an allowance which would at the end of a period of years, taking into account the breaking-up value of the vessels, replace the shipowners' capital, and that after that date no further allowance should be made:—

Held, that the Commissioners were bound under s. 12 to consider to what extent there had been a diminution of value by reason of wear and tear during the year of assessment and to decide what was a just and reasonable allowance to make in respect of such depreciation, and that they were not entitled to take into account the allowances made in previous years:

Held, also, that a hulk, which had formerly been a sailing-ship, but which had been dismantled and had had its rudder removed and was used as a floating warehouse for coal, was "plant" within the meaning of the section. JOHN HALL, JUNIOR & CO. *v.* RICKMAN **Walton J. 311**

7. —— *Income Tax—Sewer—Vested in Local Authority — "Hereditament" — "Capable of actual Occupation" — Income Tax Act*, 1842 (5 *&* 6 *Vict. c.* 35), *s.* 60, *Sched. A, Rules No.* 1, *No.* 3.

A sewer vested in and under the control of a local authority is for the purpose of income tax a hereditament capable of actual occupation, and is chargeable in respect of the annual value thereof according to Sched. A, Rule No. 1.

Quære, whether if the local authority made a profit out of the user of the sewer by other local authorities, the annual value would, under Rule No. 3, be the profit so made. YSTRADYFODWG AND PONTYPRIDD MAIN SEWERAGE BOARD *v.* BENSTED (SURVEYOR OF TAXES) **Walton J. 294**

8. —— *Stamp — Treasury Note of Foreign Government — Promissory Note — Marketable Security—Debenture—Stamp Act*, 1891 (54 *&* 55 *Vict. c.* 39), *ss.* 33, 82, 122.

A foreign Government issued a series of instruments, described as "gold coupon treasury notes," each of which contained a promise to pay the amount of the note in gold to the

REVENUE—*continued.*

bearer at a certain date two years from the date of issue; attached to each note were coupons for the payment of the interest in gold, the interest being payable abroad, but at the option of the bearer in London. The notes were redeemable at par at any time before maturity at the option of the issuing Government upon their giving sixty days' notice of their intention to redeem; they gave no security to the holder beyond the promise to pay the face amount of the note; and they were marketable, though not readily saleable, on the London Stock Exchange :—

Held, that the instruments were promissory notes within the meaning of s. 33 of the Stamp Act, 1891, and were sufficiently stamped as such; and that they were not marketable securities within the meaning of s. 122, sub-s. 1, nor debentures within the heading "mortgage, bond, debenture, covenant," in Sched. I. of that Act. SPEYER BROTHERS *v.* INLAND REVENUE COMMISSIONERS - - - **Walton J. 318**

9. —— *Stamp Duty—"Conveyance on Sale"—"Matter or Thing to be done in the United Kingdom"—Property in France—Conveyance executed in France—Consideration payable in England—Stamp Act*, 1891 (54 & 55 *Vict. c.* 39), *s.* 14, *sub-s.* 4, *and s.* 54.

By a deed, executed in France, property in France was transferred by one English company to another English company, the consideration for the transfer being shares in the latter company which were to be issued, and delivered to the former company, in England. Stamp duty having been claimed as on a conveyance on sale in Sched I. to the Stamp Act, 1891, on the ground that the deed related "to a matter or thing to be done" in the United Kingdom within s. 14, sub-s. 4, of the Act :—

Held, that the deed was a conveyance on sale, but that the provision as to the issue and delivery of shares in England was not an essential part of the deed, and that stamp duty was, therefore, not payable. MAPLE & CO. (PARIS) *v.* INLAND REVENUE COMMISSIONERS **Walton J. 591**

REVERSION—Assignment of—Lease—Covenant for quiet enjoyment—Breach of Covenant—Interruption by assignee - **155**
See LANDLORD AND TENANT. 1.

RIVER—Fishery Acts.
See under FISHERY ACTS.

RULES OF SUPREME COURT—Order XI., r. 1 (*e*) *—Service out of jurisdiction* - **254**
See PRACTICE. 2.

—— **Order XXII., rr. 1, 5.**—*Payment into and out of Court and Tender* - - - **563**
See PRACTICE. 1.

—— **Order XXV., r. 4**—*Proceedings in Lieu of Demurrer* - - - - - **487**
See DEFAMATION.

—— **Order XLV., r. 2**—*Attachment of Debts* **112**
See COMPANY. 1.

SALE—Food and drugs.
See under ADULTERATION.

SALMON FISHERY.
See under FISHERY ACTS.

SANITARY AUTHORITY—Water-closets, Repairing apparatus of existing—Requirement of notice - - - - **512**
See LONDON. 4.

SCHOOLMISTRESS — Teacher engaged by managers—Right of teacher to sue local education authority - - **494**
See EDUCATION ACTS.

SERVANT—Master and.
See under EMPLOYER AND WORKMAN.

SERVICE—Out of the jurisdiction—Writ of summons—Implied covenant not to prevent agent acting - - - **254**
See PRACTICE. 2.

SETTLEMENT—Estate duty—Property passing on death - - - - - **284**
See REVENUE. 2.

SEWAGE FARM—Poor rate—Assessment - **214**
See RATES. 2.

SEWERS — Income tax — "Hereditament" — "Capable of actual occupation" - **294**
See REVENUE. 7.

—— Nuisance from sewage—Oyster ponds on foreshore—Ancient user - - **648**
See FISHERY. 2.

SHIPPING—*Bill of Lading—Untrue Statement as to Condition of Goods—"Shipped in Good Order and Condition"—Master's Authority—Liability of Shipowner — Estoppel — American "Harter Act"—Measure of Damages.*

Shippers of goods at a foreign port chartered a ship to carry the goods to London. The charterparty provided that the master should sign bills of lading in the form endorsed on it. That form contained the clauses "shipped in good order and condition, and to be delivered in the like good order and condition," and "quality and measure unknown," and incorporated the American "Harter Act," which imposes upon shipowners and masters the duty of delivering to shippers of merchandize bills of lading stating (inter alia) "the apparent order and condition" of the merchandize delivered for carriage. The goods in question were damaged before shipment, and the damage was apparent. The master, however, took them on board and gave the shippers a bill of lading in the form indorsed on the charter. Before delivery of the goods in London the shippers sold them to purchasers there, who thereupon became indorsees of the bill of lading to whom the property in the goods passed. On presentation of the bill of lading and shipping documents the purchasers paid the contract price of the goods to the shippers, and the goods having been delivered in their damaged condition in London, the purchasers, in an arbitration between themselves and the shippers, obtained an award against the latter for damages representing the difference between the price paid by the purchasers and the value of the goods when delivered. The purchasers did not sue the shippers, who were a foreign firm, on

SHIPPING—*continued.*

that award, but now sued the owners of the ship for damages for not delivering the goods in good order and condition :—

Held, that the words in the bill of lading "shipped in good order and condition" were not words of contract, and the purchasers were not entitled to sue for any breach of contract in respect of them; but that the shipowners were bound by the representation of the master in the bill of lading that the goods were shipped in good order and condition; and that, there being sufficient evidence that the purchasers had altered their position and acted to their own prejudice on the faith of that representation, the shipowners were estopped from denying the truth of it, and were liable in damages to the purchasers for not delivering the goods in good order and condition, the measure of damages being the difference between the price paid by the purchasers and the value of the goods when delivered, together with the reasonable expenses incurred on delivery by reason of their damaged condition. COMPANIA NAVIERA VASCONZADA *v.* CHURCHILL & SIM. THE SAME *v.* BURTON & Co. - - - - - **Channell J. 237**

2. —— *Charterparty—Charter of Ship for Voyage—Implied Condition that Shipowner will not use Ship in Manner prejudicial to the Charterer—Carriage of Bunker Coal intended for use on future Voyage.*

The plaintiffs chartered the defendants' ship to load "a full and complete cargo . . . . not exceeding what she can reasonably stow and carry over her tackle, apparel, provisions and furniture," and proceed therewith to two or three ports of discharge. On arrival of the ship at her first port of discharge the defendants took on board a large quantity of bunker coal intended for use, not upon the existing voyage, but upon some prospective voyage to be commenced after her final discharge. In consequence of the loading of the coal, the ship, on arriving at her next port of discharge, had to be lightened before she could get over the bar, whereby the plaintiffs were put to considerable expense. But for the loading of the coal she would have been able to enter the port without lightening :—

Held, that under such a charterparty the shipowner is not entitled to load, to the disadvantage of the charterer, more bunker coal than is reasonably necessary for the seaworthiness of the ship upon the chartered voyage and for the due performance of that voyage; that there is an implied term in the contract that the ship shall, except as aforesaid, be used only for the purposes of the charterers; and that the defendants had consequently committed a breach of their contract and were bound to recoup the plaintiffs the expense to which they had been put. DARLING *v.* RAEBURN **Kennedy J. 572**

3. —— *Mortgage—Ship—Invalid Mortgage—Registration of—Power of Court to expunge from Register.*

Where a transfer of an interest in a ship, void by reason of fraud or for any other cause, has been registered, the Court has power, by virtue of its inherent jurisdiction, to rectify the register

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by ordering the entry of the void transfer to be expunged. BROND *v.* BROOMHALL **Phillimore J. 571**

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2 & 3 Will. 4, c. 45, s. 24—*Representation of the People* - - - - - - **11**
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1847.

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STREET—*Making-up—Power to Charge Frontagers residing outside Limits of Local Authority—Local Government—Public Health Act*, 1875 (38 & 39 *Vict. c.* 55), *s.* 150.

A local authority has no jurisdiction under s. 150 of the Public Health Act, 1875, to charge a proportion of the expenses of making up a street on the owners or occupiers of premises which, though fronting, adjoining or abutting on the street, are outside the boundary of the local authority. HORNSEY CORPORATION *v.* BIRKBECK FREEHOLD LAND SOCIETY - - Div. Ct. 521

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TRADE UNION—*Officer Wilfully withholding Money of the Union—Absence of Fraud—Liability to Penalties—Trades Unions Act*, 1871 (34 & 35 *Vict. c.* 31), *ss.* 9, 12.

If an officer of a trade union wilfully withholds money of the trade union, he is not, in the absence of fraud, liable to the penalties imposed by s. 12 of the Trades Unions Act, 1871, but under s. 9 of the Act an action may be brought against him for the recovery of the money.

Barrett v. *Markham*, (1872) L. R. 7 C. P. 405, applied. MADDEN *v.* RHODES - **Div. Ct. 534**

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WATERWORKS—*Injurious affection of Land—Loss of Support—Authorized Working—Compensation—Interest—Waterworks Clauses Act*, 1847 (10 & 11 *Vict. c.* 17), *ss.* 6, 12.

By a special Act which incorporated the Waterworks Clauses Act, 1847, the defendants were authorized to make and maintain certain waterworks, including a well and pumping station. After the completion of the works the defendants, for the purpose of their undertaking, took, by means of pumping operations, such water as was found in and under the lands taken by them for constructing their works, and in so doing caused damage to the plaintiff's premises by the abstraction of a bed of wet running silt which formed the sub-soil and support of the plaintiff's land. In respect of the damage thus sustained the plaintiff claimed compensation under s. 12 or s. 6 of the Waterworks Clauses Act, 1847, and, an arbitration having been held, was awarded compensation by the umpire. In an action by the plaintiff to recover the sum awarded and costs and interest :—

Held, that the plaintiff's premises had been injuriously affected ; that s. 12 empowered the defendants to take water not only for the purpose of the construction of the authorized works, but also, after their completion, for the purpose of the undertaking, and that compensation was, therefore, payable to the plaintiff under s. 12 ; that, assuming the power to take water after the completion of the works was derived from the special Act, and not from s. 12, the plaintiff's premises had been injuriously affected by the exercise of the powers authorized by the special Act within the meaning of s. 6 of the Waterworks Clauses Act, 1847, so as to entitle the plaintiff to be paid compensation under s. 6.

Held, also, that interest at 4 per cent. from the date of a demand in writing was payable on the amount of compensation awarded and on the taxed costs.

The rule of construction of Acts of Parliament that the effect of words, perfectly clear in themselves, is not limited by general words in a preamble applies equally to the heading of a section. FLETCHER *v.* BIRKENHEAD CORPORATION - - - - - - - **Bray J. 605**

WEIGHTS AND MEASURES — *Prosecution by Inspector—"With the Consent of the Local Authority"—General Consent — Weights and Measures Act*, 1904 (4 *Edw.* 7, *c.* 28), *s.* 14.

It is not necessary under s. 14 of the Weights and Measures Act, 1904, which provides that an inspector of weights and measures may, with the consent of the local authority, prosecute before a Court of summary jurisdiction any information arising under the Weights and Measures Acts, that a separate consent shall be given by the local authority in each particular case ; a general consent that a named inspector shall prosecute is sufficient. TYLER *v.* FERRIS - **Div. Ct. 94**

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